Supreme Court of the United States

OCTOBER TERM, 1968

No. 748

THORNTON A. JENKINS,

Petitioner,

—v.—

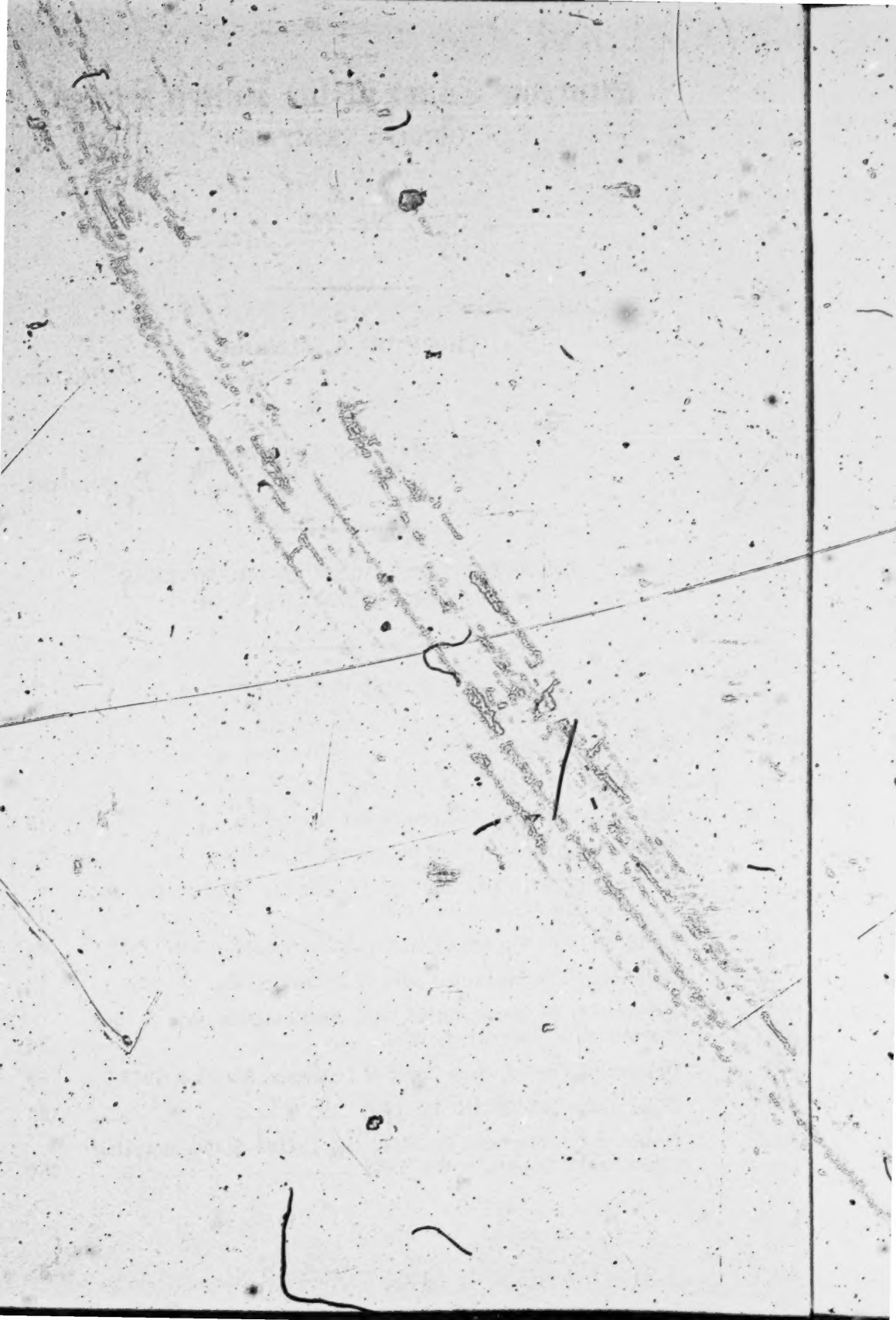
THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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RELEVANT DOCKET-ENTRIES

A. Criminal Action No. 630, 1968 (Superior Court, New Castle, County)

1.	6- 8-65	True Bill presented to the Grand Jury
8.	6-15-65	Motion of Thornton A. Jenkins to Dismiss the Indictment
10.	7- 1-65	Affidavit of Henry N. Herndon, Jr., Esquire
26.	12-13-65	Memorandum Decision Denying Motions to Dismiss the Indictment
30.	12-17-65	Motion of Thornton A. Jenkins for Discovery and Inspection
31.	12-17-65	Motion of Thornton A. Jenkins to Compel Election by State to Proceed on only One Count of the Indictment and for a Severance
32.	12-17-65	Motion of Thornton A. Jenkins to Suppress Evidence
35.	1- 4-66	Motion of Thornton A. Jenkins and Clifford A. Warner for Authorization to Retain a Medical Doctor and Order thereon.
	1- 7-66	Motion of Thornton A. Jenkins to Suppress Evidence under Rule 41(e)
	1-10-66	Trial Begins
36.	1-13-66	As to T. Jenkins & C. Warner—Motion by Defendants for Acquittal for Failure of State to Prove Prima Facie Case as to Murder 1st Degree—Motion denied. State's Motion to Amend Indictment—Motion Granted. Trial ends—Jury finds Thornton A. Jenkins Guilty of Murder in the First Degree—with a Recommendation of Mercy and Guilty of Burglary Fourth Degree. Jury finds Clifford A. Warner Guilty of Murder in the Second Degree and also Guilty of Burglary Fourth Degree.

RELEVANT DOCKET ENTRIES

		Defendants' Attorneys Make Application for Time to be Extended, an Additional Five (5) Days under Rule 29 so that the Time for Rule 29 & 33 will be Identical—Application Granted. For List of Witnesses and Jurors, See Jury Book c, Page 118.
	1-18-66	As to Thornton A. Jenkins—Copy of Letter to Judge Wright from H. N. Herndon, Jr., Esq. Attached to Motion for Judgment of Acquittal and Alternatively for a New Trial under Rules 29 and 33 and Affidavit of Mailing
41.	3-11-66	As to Thornton A. Jenkins—Letter to John F. Hyde, Prothonotary, from Judge Wright, Re: Motion for Judgment of Acquittal or Alternatively for a New Trial is Denied.
44.	3-18-66	As to Thornton A. Jenkins—As to Burg. 4th Degree Sentence imposed: Pay Cost. Imprisoned for a Period of Five (5) Years, Commencing 3/18/65 and Ending 3/17/70. Commitment Papers Issued. As to Murder First Degree—The Sentence of the Court that you Thornton Albert Jenkins be Committed to the Custody of the State Board of Corrections and Taken from the Bar of this Court to the New Castle Correctional Institution, the Place from Which you Came, and be there Safely and Securely Kept in Custody until Friday, the 15th day of April, A.D. 1966, and that Day betwen the Hours of 10 O'clock in the Forenoon and 2 O'clock in the Afternoon you be Taken to Some Convenient Place of Private Execution within the Precincts of said Prison Enclosure and that you be then and there Hanged by the Neck until you be Dead; and may God have Mercy on your Soul. You are now Committed to the Custody of the State Board of Corrections for the Purpose of Carrying this Sentence into Effect.

RELEVANT DOCKET ENTRIES

45.	3-22-66	Notice, Motion for Certification and Stay of Execution
46.	3-25-66	Certification Pursuant to 11 Del.C. § 4507 and Order Staying Execution
49.	3-29-66	Notice of Appeal by Thornton A. Jenkins
52.	3-29-66	As to Thornton A. Jenkins, as to Murder First Degree—Order of Judgment Received from /s/ George R. Wright, Judge
58.	3-29-66	As to Thornton A. Jenkins—as to Burglary Fourth Degree—Order of Judgment Received from /s/ George R. Wright, Judge—
60.	4-21-66	As to Thornton A. Jenkins and Clifford Warner—Transcript of Trial Record—Trial—January 10-13, 1966—by Donald M. Matthews, Court Reporter
62.	5-29-67	Mandate Received from T. E. Townsend, Clerk of Supreme Court, On consideration whereof It Is Ordered and Adjudged that the said judgment or order be and it is hereby reversed. Record to be returned to use from one of the offices of the Justices of the Court
64.	7- 5-67	As to Thornton A. Jenkins—Motion of Defendant Thornton A. Jenkins For a Severance: Defendant Thornton A. Jenkins, by his attorney, Henry N. Herndon, Jr., hereby moves the Court pursuant to Rule 14 of the Rules of Criminal Procedure for an order directing that the moving defendant be separately tried on the remaining counts of the Indictment upon the grounds that a joint trial of the said defendant and his co-defendant, Clifford Warner, would be prejudicial, since there is no substantial, competent evidence of the moving defendants' guilt upon the charge of first degree murder other than the statements of the moving defendant and the defendant Warner; the defenses of these two de-

fendants are antagonistic; and it would be a practical impossibility for jurors to disassociate evidence offered against defendant Warner with the evidence offered against the moving defendant. /s/ Henry N. Herndon, Jr.,—No Objection: Attorney General by: /s/ Jay H. Conner—SO ORDERED this 29th day of June, 1967 /s/ George R. Wright.

65. 10- 4-67 As to Jenkins—1st Rev. CRIMINAL TRIAL CALENDAR Trial ends Jury finds Deft. Guilty as charged. Exhibits 1-15 filed in jacket except #3A in vault. Exhibit 16 thru 22E.—filed in vault except #17 & 21 filed in jacket. SEE Jury Book D, Page 42.

66. 10-13-67 As to Thornton Jenkins—SENTENCE IMPOSED—PAY COST. IMPRISONED for the remainder of his natural life commencing upon the expiration of the five (5) year sentence defendant is now serving for a charge of Burglary Fourth Degree. Commitment papers issued.

67. 11-14-67 As to Thornton Jenkins—Transcript of Trial record rec'd & filed.

68. 11-20-67 As to Thornton A. Jenkins—Notice of Appeal rec'd & filed.

B. Case No. 28, 1966 (Supreme Court)

7. 3-28-67 Opinion dated March 27, 1967

8. 4- 5-67 Appellant's petition for reargument

15. 5-25-67 Opinion dated May 24, 1967

C. Case No. 125, 1967 (Supreme Court)

6. 3-11-68 Opinion dated March 11, 1968

7. 3-14-68 Order of Final Judgment dated March 12, 1968

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Criminal Action No. 630, 1965

THE STATE OF DELAWARE

v.

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND, CLIFFORD ALONZO WARNER

INDICTMENT BY THE GRAND JURY

The Grand Jury of New Castle County charges AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND, and CLIFFORD ALONZO WARNER with the following offenses, felonies, committed in the County of New Castle, State of Delaware:

COUNT I

Murder in the first degree, in violation of Title 11, Section 571 of the *Delaware Code* of 1953:

THORNTON ALBERT JENKINS and CLIFFORD ALONZO WARNER, on or about the 16th day of March, 1965, in the County of New Castle did then and there murder Brice Page with express malice aforethought by means of a physical beating of the face, head and body.

COUNT II

Murder in the 2nd degree, in violation of Title 11, Section 572 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, on or about the 16th day of March, 1965, in the County of New Castle, did then and there murder Brice Page with malice aforethought by means of beating the said Brice Page during the course

of the commission of a felony, to wit: burglary in the 4th degree; said felony being in violation of Title 11, Section 395 of the *Delaware Code* of 1953.

COUNT III

Accomplice to Murder in the 2nd degree in violation of Title 11, Section 572 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, on or about the 16th day of March, 1965, in the County of New Castle, did then and there aid, abet, procure, command and counsel Thornton Albert Jenkins and Clifford Alonzo Warner to commit the offense of Murder in the 2nd degree, to wit: murder Brice Page with malice aforethought by physically beating the said Brice Page during the course of the commission of a felony, to wit: burglary in the 4th degree; said felony being in violation of Title 11, Section 395 of the *Delaware Code* of 1953, the said Amos Henry Jenkins was an accomplice pursuant to Title 11, Section 102(c) to the offense of Murder in the 2nd degree.

COUNT IV

Accomplice to Murder in the 2nd degree in violation of Title 11, Section 572 of the *Delaware Code* of 1953:

MONROE JOHN TOWNSEND, on or about the 16th day of March, 1965, in the County of New Castle, did then and there aid, abet, procure, command and counsel Thornton Albert Jenkins and Clifford Alonzo Warner to commit the offense of Murder in the 2nd degree, to wit: murder Brice Page with malice aforethought by physically beating the said Brice Page during the course of the commission of a felony, to wit: burglary in the 4th degree; said felony being in violation of Title 11, Section 395 of the *Delaware Code* of 1953, the said Monroe John Townsend was an accomplice pursuant to Title 11, Section 102(c) to the offense of Murder in the 2nd degree.

COUNT V

Conspiracy, in violation of Title 11, Section 105 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, in the County of New Castle, on or about the 16th day of March, 1965 did then and there unlawfully conspire, combine, confederate and agree together, one with the other, to commit a felony, to wit: Murder in the 2nd degree, by murdering Brice Page with malice aforethought by physically beating said Brice Page during the course of the commission of a felony, to wit: burglary in the 4th degree; said felony being in violation of Title 11, Section 395 of the *Delaware Code* of 1953, which is a violation of Title 11, Section 572 of the *Delaware Code* of 1953.

COUNT VI

Burglary in the 4th degree in violation of Title 11, Section 395 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, on or about the 16th day of March, 1965 in the County of New Castle, did then and there feloniously break and enter into the premises (a junkyard) of Morris Gordon located at 503 South Market Street, Wilmington, Delaware, with intent to commit larceny therein at or about 8 P.M.

COUNT VII

Burglary in the 4th degree in violation of Title 11, Section 395 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, on or about the 16th day of March, 1965, in the County of New Castle, did then and there feloniously break and enter into the premises (a junkyard) of Morris Gordon located at 503 South Market Street, Wilmington, Delaware, with intent to commit larceny therein at or about 9 P.M.

COUNT VIII

Conspiracy, in violation of Title 11, Section 105 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, in the County of New Castle on or about the 16th day of March, 1965 did then and there unlawfully conspire, combine, confederate and agree together, one with the other, to commit a felony to wit: burglary in the 4th degree by feloniously breaking and entering the premises (a junkyard) of Morris Gordon located at 503 South Market Street, Wilmington, Delaware with intent to commit a larceny therein in violation of Title 11, Section 395 of the *Delaware Code* of 1953.

COUNT IX

Conspiracy, in violation of Title 11, Section 105 of the *Delaware Code* of 1953:

AMOS HENRY JENKINS, THORNTON ALBERT JENKINS, MONROE JOHN TOWNSEND and CLIFFORD ALONZO WARNER, in the County of New Castle on or about the 16th day of March, 1965, did then and there unlawfully conspire, combine, confederate and agree together, one with the other, to commit a felony to wit: burglary in the 4th degree by feloniously breaking and entering the premises (a junkyard) of Morris Gordon located at 503 South Market Street, Wilmington, Delaware with intent to commit a larceny therein in violation of Title 11, Section 395 of the *Delaware Code* of 1953.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Cr. A. No. 630, 1965

STATE OF DELAWARE

v.

THORNTON A. JENKINS, ET AL., DEFENDANTS

MOTION TO SUPPRESS EVIDENCE
UNDER CRIMINAL RULE 41(e)

Defendant Thornton A. Jenkins, by his attorney, Henry N. Herndon, Jr., hereby moves the Court pursuant to Rule 41 of the Rules of Criminal Procedure to suppress for use as evidence all of the items seized as a result of a search of the premises at 617 East Fifth Street, Wilmington, Delaware on or about March 17, 1965, together with all photographs of such items, including but not limited to the following:

1. Pair of trousers belonging to said defendant;
2. Jacket belonging to said defendant;
3. Linoleum knife with black handle and the name of Norman Deitch Co., Phila., Pa. on the blade;
4. Coils of plastic covered wire cable;
5. 2 fire extinguishers;
6. Miscellaneous brass in cardboard box;
7. Lantern;
8. Burlap bag containing fire extinguisher inserts.

The grounds upon which the motion is made are as follows:

1. The movant was a tenant and occupant of the premises together with one Leona Marshall on March 17, 1965 and had been for approximately seven or eight months prior thereto;

2. The movant was neither asked for nor gave his consent to the search of the premises by officers of the Wil-

mington Police Department on March 17, 1965 or at any other time;

3. Upon information and belief, no other person owning or occupying the said premises freely consented to a search of the premises by officers of the Wilmington Police Department on or about March 17, 1965;

4. Upon information and belief, the search was conducted of the said premises by officers of the Wilmington Police Department without a search warrant.

MORRIS, JAMES, HITCHENS
& WILLIAMS

/s/ H. N. HERNDON, JR.
HENRY N. HERNDON, JR.
701 Bank of Delaware Building
Wilmington, Delaware
Attorney for Defendant
Thornton A. Jenkins

STATE OF DELAWARE)
) ss.
NEW CASTLE COUNTY)

THORNTON A. JENKINS, being duly sworn according to law, deposes and says that the facts stated in the foregoing Motion to Suppress are true and correct to the best of his knowledge, information and belief.

/s/ THORNTON A. JENKINS
THORNTON A. JENKINS

SWORN TO and SUBSCRIBED before me this 7th day of January, 1966.

/s/ FRANK H. SCHMIDT
Notary Public

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Cr. A. No. 630, 1965

STATE OF DELAWARE

v.

THORNTON A. JENKINS, ET AL., DEFENDANTS

MOTION TO SUPPRESS EVIDENCE

COMES NOW, defendant Thornton A. Jenkins, by his attorney, Henry N. Herndon, Jr., and moves for the suppression for use as evidence in or at any hearing or trial before this Court of a certain writing dated March 17, 1965 and consisting of two (2) typewritten pages which purports to be a statement made and signed by defendant Thornton A. Jenkins. The grounds upon which this motion is based are that the above-described statement was not the product of a rational intellect and free will but was the result of fear, coercion and duress, and was obtained without the benefit of counsel and was, therefore, illegally and unlawfully obtained for the following reasons:

1. Said statement was obtained as a result of abuse of the defendant, psychological coercion of the defendant, the exercise of undue influence upon the defendant and illegal restraint and coercion and duress exercised upon the defendant.

2. The statement was obtained under the circumstances which violate the Constitution of the State of Delaware and the Constitution of the United States of America, including but not limited to Article I, Section 7 of the Delaware Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. The statement was obtained without due process of law and against the law of the land.

4. The defendant was not adequately afforded the right to consult with legal counsel, and legal counsel was

not assigned to represent the defendant, prior to the time his purported statement was obtained, thereby depriving the defendant of his right to counsel.

5. The defendant was not properly advised of his rights under the Constitution of the State of Delaware and the Constitution of the United States before giving and signing the statement.

Defendant believes, and therefore states, that the State will seek to introduce into evidence in the hearing before this Court the above referred to statement, which was unlawfully and illegally obtained for the reasons stated.

WHEREFORE, the defendant respectfully prays for the reasons stated that the described purported statement of defendant be suppressed as evidence against him in the hearing before this Court.

MORRIS, JAMES, HITCHENS
& WILLIAMS

By: /s/ HENRY N. HERNDON, JR.
701 Bank of Delaware Building
Wilmington, Delaware
Attorney for Defendant
Thornton A. Jenkins

December 17, 1965

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Transcript of trial—January 10-13, 1966

[EXCERPTS FROM THE TESTIMONY OF SGT. EUGENE MALONEY]

[fol. 91] MR. SNELLENBURG: We will want a voir dire in that behalf also directed to the fact whether there was a warrant or not and to whether there was permission to make the search and by whom and by what authority, et cetera.

THE COURT: Well, are you going to get into that with this witness?

MR. STONE: Yes.

THE COURT: If that will be your next order of business, why don't you go into it right now out of the presence of the jury.

BY MR. CONNER:

Q Sergeant Maloney, the next morning, March 17, were you assigned to investigate the alleged homicide of Brice Page?

A I was assigned to assist Sergeant Ogden and Sergeant Lingle regarding this particular case.

Q As part of your investigation did you visit the premises at—I believe it is 617 East 5th Street?

A Yes, sir, I did.

Q And would you describe what you did upon first reaching these premises.

A I knocked on the door. The door was open. A lady come.

Q Who came to the door?

[fol. 92] A Leona Marshall.

Q What was your conversation with her at this time?

A I identified myself to her. I asked her if she is the lady of the house. She stated she was. I asked her if

Thornton Jenkins was there. She stated he was not there at this particular time.

Q Now when you asked her was she the lady of the house did you ask her did she rent the house also?

A Not specifically whether she rented it; I just asked her if she was the lady of the house and was she in charge of the house and she stated she was.

Q And did you ask her if you could enter the house at this time?

A Yes, sir, I did.

Q Did you enter the house?

A I did.

Q And from there did you make any search of the house at that time?

A No, sir.

Q Now what did you do next?

A We went into the house in the dining room—

Q I think we can skip this. Where did you go after leaving the house at this point?

[fol. 93] A After leaving the house?

Q Yes.

A With the persons that were there we returned to the police station.

Q Did you again talk to Leona Marshall at the police station?

A Yes, sir, I did.

Q What was your conversation with Leona Marshall at the police station?

A I advised her of her rights regarding searching her house and requested permission from her, since she is the lady of the house, to search the house. She stated that I could search the house, that she had nothing to hide.

Q Did you determine her actual relationship to the house; was she owner, tenant or what was she?

A At a later date we did determine that.

Q What did you determine?

A That she actually is the one that pays the rent for that house.

Q She is the tenant?

A She would be the tenant.

Q Now when you asked her for permission to search the house did you tell her anything else that could result [fol. 94] as a result of the search?

A No. Like I say, I advised her of her rights and requested permission to search the house. This permission was granted.

Q And did you return with her to the house?

A With her, along with Sergeant Harvey Gregg.

Q And did you talk to or have any conversation with her when you arrived back at the house?

A Yes, sir, we did. I once again explained to her in the presence of Sergeant Gregg that it wasn't necessary for her, if she didn't desire to, to let us search the house. She once again stated she had nothing to hide and that we could search it.

Q And did you search the house?

A Yes, sir, we did.

Q And what did you find in the house?

A After a brief search of the house, actually in the basement, we found coils of scrap with a plastic sort of a—copper scrap with a plastic coating on them. We found several boxes of scrap materials and also several fire extinguishers.

Q Did you find any articles of clothing?

A Yes, sir; on the first floor, front room, which would be considered a bedroom, which we understood was occupied by Miss Marshall and also Thornton Jenkins, we [fol. 95] found a brown jacket in there with a zipper that had been worn by Thornton Jenkins the night previous.

Q And what did you do with this evidence?

A Photographs was taken of the evidence while it was at the house. After the photographs were taken the evidence were removed with my assistance. We placed it in the patrol wagon. It was taken to Central, taken from the patrol wagon, placed on dollies, and taken to our Records Division.

MR. CONNER: Thank you. Your witness.

BY MR. HERNDON:

Q Officer, did you have a warrant for making this search?

A No, sir.

Q A search warrant?

A No, sir, I did not.

Q As I understood your testimony, you stated that on two occasions you asked Miss Marshall for permission to search the premises; is that correct?

A Yes, sir.

Q The first instance being in the police station?

A Yes, sir, that is correct.

Q And the second upon your arrival at the premises?

A Yes, sir.

[fol. 96] Q And this was the only search you conducted of the property; is that correct?

A Yes, sir.

Q You only went down there and searched it once?

A Myself, yes, sir.

Q Were there other searches of the property?

A Not to my knowledge.

Q Now you were one of the arresting officers, I assume, who went down there before ten o'clock on the morning of the 17th; is that correct? There were no arrests made down there or apprehensions?

A Yes.

Q What did you say to Miss Marshall when she opened the door?

A I identified myself to her. I asked her if she was the lady of the house. She stated she was. I asked her if Thornton Jenkins was there. She stated he was not there at this time. I asked her if we could come in; she stated yes, that she had nothing to hide at that time. We entered the house.

Q Then what did you do?

A The first room you come to on the left is a bedroom.

Q Now we are talking about the time you apprehended these people when you first went down there on the [fol. 97] morning of the 17th?

A Yes, sir. The first room on the left is considered a bedroom. The next room is more or less a dining room. At that time there was another lady sitting there. There was three men present at that particular time. One of them was Clifford Warner, who we had been talking to the night before. I told the two uniform officers who had entered with me that that was Clifford Warner seated there. At that time Sergeant Mackey called me from the rear yard. Thornton Jenkins had just come out the back door and he told me Thornton Jenkins was in the rear yard. I went to the rear yard where Thornton was and Thornton come back in the house with me.

Q Then what did you do with the people you found in the house?

A We advised them that we were having an investigation and requested that they come with us to the Detective Division.

Q You requested that. Did they have any choice as to whether or not they came?

A It was a request. Nobody refused the request.

Q Well, what exactly did you say, "Would you please come?"

A I imagine I said words to the effect, "We would like you to come with us to the Detective Division."

[fol. 98] Q When you walked in did you frisk the defendants in this case; did you frisk Warner and Jenkins?

A No, I went to the rear yard first after I had observed them when Sergeant Mackey called me. Warner was still seated at a table at that particular time. I told the two uniform officers that that was Clifford Warner. I was called to the rear yard; now whether the uniform officers frisked Mr. Warner or not, I am not sure.

Q Did you frisk Jenkins?

MR. CONNER: Your Honor, I think we are getting off the limited purpose of this voir dire, to determine whether there was consent to search this premises.

MR. HERNDON: The point is—and I think this is my objective—to show the general atmosphere in which Miss Marshall found herself when she went, for whatever purpose or reason, with the officers to the police station.

THE COURT: Are you going to have her here to testify?

MR. STONE: She is here. I was planning to call her when I finish with this officer, anyway.

THE COURT: Rather than creep up on this, why not ask her if she was afraid of what she was doing? That is what you are after, isn't it?

MR. HERNDON: My problem is to find out precisely [fol. 99] from Officer Maloney what he told her, and the phrases he used are so polite in respect to the way he says he addressed Miss Marshall and, in my understanding, are rather inconsistent with the manner in which she was addressed.

THE COURT: I am not going to limit you at all. You may proceed along this line with this officer if you wish. I just suggest that if you want to find out what her state of mind was, she is here and you can find out from her, but you may proceed with this witness.

BY MR. HERNDON:

Q Did you observe the frisking of Thornton Jenkins?

A When Thornton Jenkins was in the rear yard, when I got him, I would say there is a good possibility that I actually patted him down.

Q Did you or didn't you?

A That I can't say. I say there is a good possibility I probably did pat him down.

Q Did Miss Marshall ask you whether or not you had a warrant when you arrived?

A No, sir, she did not.

Q How was Miss Marshall dressed when you arrived?

A I believe she might have had some type of robe on.

Q A housecoat or something like that?

[fol. 100] A Housecoat or something along that line.

Q Did you tell her to get some clothes on?

A After we had requested them to come to the Detective Division with us.

Q Did you tell her to get some clothers on? The answer is yes; is that correct?

A After we told them, asked them to come to the Detective Division with us, she had to get some clothes on.

Q You haven't answered my question, Officer. Did you tell her to get some clothes on?

A I don't know.

Q You don't know? Did you say to her, "We are going downtown"?

A No, sir.

Q Do you recall whether you said that or not?

A I don't believe I would ever use a statement like that, "We are going downtown."

Q Did she ask you why you were going downtown, why she was to go downtown?

A They were told that they were going with us in regards to an investigation.

Q Did you tell her this, or words to this effect, that "You will find out when we get down there"?

[fol. 101] A No, sir, I did not.

Q You are certain of that or you don't recall?

A I would say I did not.

Q Was she free not to go with you if she didn't wish to?

A She made no objections to going.

Q You haven't answered my question.

MR. CONNER: Your Honor, that is a speculative question. If she didn't make any objection to going, it is irrelevant whether she was free to go or not.

MR. HERNDON: I think it colors the manner in which he told her whatever he did tell her, and I think on that basis alone it is a proper question.

THE COURT: Of course these subjective questions that you are asking, the important thing is what she believed, not what he thought, but I will allow you to go forward; there is no jury here and you may answer the question.

BY MR. HERNDON:

Q Was she free not to go with you if she didn't choose to?

A If she didn't choose to, she would have went with us.

Q In other words, she had no choice as to whether or not she was to go with you?

A As it was first put to—

[fol. 102] Q Would you please just answer the question.

A I would say she had a choice to her original answer.

Q But you just said that if she hadn't chosen to go, as you phrased it, you would have had her go in any event?

A Yes, sir.

Q So therefore she had no choice as to whether or not she would go; is that correct?

A I would say that is correct.

Q Now when you got down to the police station how did you go to the police station; how many police vehicles were there; how many officers?

A I would say they were taken in three different vehicles.

Q And how many police officers?

A Possibly five officers.

Q And how many people went down among those you apprehended?

A Six.

Q All right, what time did you arrive at the police station?

A I would say roughly at ten o'clock, in the neighborhood of ten o'clock.

Q And where did you go and where, more particu-

[fol. 103] larly, did you take Miss Marshall upon your arrival at the police station?

A To the Detective Division.

Q And did you sit her someplace or what did you do with her, if you recall?

A As I recall, she probably was seated on a bench just prior before going into the Detective Division door.

Q In the hallway?

A In a hallway there.

Q In other words, as you walk into the area there is the main desk at the front, then a corridor going down to the right and then at the end of the corridor there is the Detective Division?

A Yes, sir.

Q And she was sitting on the bench, prior to going into the Detective Division, in that corridor?

A That is where I remember.

Q Now is that where she was when you asked her whether or not she would permit you to search the house?

A No, sir.

Q Where did that occur?

A That occurred right inside the Detective Division. I believe we were both standing up towards the rear of [fol. 104] the Detective Division in another room which is separated there.

Q Would that have been immediately inside in the vicinity of Lieutenant Purnell's desk?

A Yes, sir, in that vicinity, somewhat in back of his desk.

Q Was anyone else present at the time you asked Miss Marshall's permission to search?

A I don't believe so.

Q Do you recall precisely what you said to Miss Marshall at that time?

A Not precisely. I can tell you more or less what I asked her.

Q All right, did you warn her, before you asked her, of her rights, and precisely how did you warn her?

A I informed her—previous to this there was some mention of a black Pontiac. I mentioned to her that we were conducting an investigation regarding a burglary. This Pontiac apparently was used in the burglary and that I would like to search her house. I informed her that she didn't have to let me search her house, that if

she wanted to, she could make a phone call, that she could do anything she desired along that general line in regards to a lawyer also. She informed me she had nothing to hide, that I could search her house.

[fol. 105] Q Sergeant Maloney, did you make any notes of your investigation and what you advised Miss Marshall of at this time?

A Yes, I made some notes.

Q I call upon you or the State to produce them.

THE COURT: Do you have those? These notes relate to those questions.

MR. STONE: Same objection from the State, your Honor; I believe Sergeant Maloney can tell you.

THE WITNESS: I have notes in my pocket.

THE COURT: Would you produce them.

MR. CONNER: May we see them first, your Honor?

(The witness removed some papers from his pocket and they were shown to Mr. Conner.)

MR. CONNER: He has many notes here in addition to one paragraph which relate to this questioning. Could he just read his notes rather than produce the whole—

MR. HERNDON: Could you fold it so I couldn't see the rest of it?

MR. SNELLENBURG: Aren't we to be the judges, if it please the Court, as to what portions of the record may or may not be pertinent to what he is saying?

THE COURT: Mr. Herndon's question was to produce notes relating to the advice that he gave the lady.

[fol. 106] MR. SNELLENBURG: I understood his question.

THE COURT: I think we can establish for him if there are any notes which he can relate to that.

MR. SNELLENBURG: Then he is exercising his judgment as to which portion of his notes may relate to his advice to the witness. That is my position.

THE COURT: I think he can do that.

BY THE COURT:

Q Officer, is the paragraph being laid before you the only part of your notes which relate to your advice to this lady?

A As far as the advice to the lady, yes, your Honor.

THE COURT: All right, would you show that to Mr. Herndon so we can move along.

MR. HERNDON: Just fold that.

THE WITNESS: Actually, Mr. Herndon, there is nothing else on here. This is just blank. This is another thing here; I didn't want to rip it out.

(Papers of the witness were shown to Mr. Herndon.)

BY MR. HERNDON:

Q Officer, when did you prepare these notes?

A I would say that was probably my first opportunity, after I had talked with the lady, to prepare those notes and I would say it was definitely on March 17. The [fol. 107] exact time I don't honestly know unless I have the time on there.

Q You do have a time on here, 11:40 a.m., 3-17-65.

A Well, that would be the time I am actually advising her. Whether that is actually the time I wrote it down there—it was written down that day; whether it was the particular time or not I can't say.

Q So you think it was that day?

A It would have been that day.

Q Your notes don't reflect any advice given to her that she didn't have to grant permission for you to search that property, do they?

A I have just got on here noted that—

Q Would you answer my question, please, sir.

A Repeat the question, please.

(The Court Reporter read back the previous question as follows:

"Question: Your notes don't reflect any advice given to her that she didn't have to grant permission for you to search that property, do they?")

A No, the notes don't reflect that.

Q And this was a fairly contemporaneous writing of what transpired at the time you requested permission to search; is that not correct?

[fol. 108] A They would have been that particular day.

Q Now after you made this request what happened then?

A Sergeant Gregg had been called at his home to come in and assist me. Just at about that time Sergeant Gregg arrived; he accompanied myself and Miss Marshall to 617 East 5th Street.

Q You were the only two police officers present at that time?

A At this particular time, yes, sir.

Q Now when you arrived at the premises of 617 East 5th Street what if anything do you recall having said?

A I once again advised Miss Marshall that it wasn't necessary for her to consent. However, previously in the notes she mentioned there that if she didn't consent she knew we could have gotten a search warrant and she had nothing to hide. At that time she permitted us to search the house.

Q You didn't make any reference to that in your notes, though, did you?

A What I actually advised her?

Q At that time.

A No, sir.

Q There is no reference to your having advised her of anything at that time or made reference to any of that?

A Not in these notes, no, sir.

[fol. 109] Q When you got there didn't you simply ask her, "Will you unlock the door" or words to that effect?

A No, sir, I did not.

Q Now was this the only occasion on which you searched the premises at 617 East 5th Street?

A Yes, sir.

Q You never went down there again?

A To search the premises? No, sir.

Q Before you went down on this occasion did you simply say, "We are going back to your house" to Miss Marshall?

A No, sir, I did not.

Q So, as I understand your testimony, Sergeant Maloney, you only went to the premises at 617 East 5th Street on two occasions on March 17, 1965?

A Yes, sir.

Q The first occasion was when the defendants, together with a number of other persons, were taken from the premises voluntarily or involuntarily—however it may be—to the police station, and the second occasion is when you went down with Sergeant Gregg and searched the property?

A Yes, sir.

Q Incidentally, Officer, prior to asking for permission to search the property did you advise Miss Marshall that [fol. 110] you were investigating either a homicide or a burglary?

A We advised her we were investigating a complaint of murder.

Q Did you at any time ask the defendant Thornton Jenkins for permission to search the property?

A No, sir, I did not. On that one occasion Leona couldn't find her key. She said she thought—

Q Just answer my question.

A No, sir, I did not.

MR. HERNDON: Thank you, Officer.

BY MR. CONNER:

Q Officer, what was the statement that Leona Marshall made to you one time to the effect that she knew you could get a search warrant anyway?

A When she was requested at Central to make a search of her house she stated she had nothing to hide, that we could search it because she knew we could get a search warrant for the house anyway.

Q And that is reflected in your notes, that statement of hers; correct?

A. Yes, sir, it is.

Q But you advised her more than is reflected in your notes?

[fol. 111] A All I have in my notes is that we advised her—

Q You advised her at Central, where she made the statement that she knew you could get a search warrant anyway, and then again you advised her of all these things, which you previously testified, back at her house in the presence of Sergeant Gregg?

A Yes, sir.

MR. CONNER: I have no further questions.

THE COURT: Does the defense want to put on any evidence in support of their motion to suppress?

MR. CONNER: We were going to call Leona Marshall on voir dire.

THE COURT: Prior to that I want to take a recess. We will take a 15-minute recess.

(There was a short recess taken.)

MR. CONNER: I think we are finished with this witness on voir dire.

THE COURT: I want to ask you one or two questions.

BY THE COURT:

Q Officer, when you went back to search these premises where were the defendants, Jenkins and Warner?

A At Central, at the police station.

Q They were being held there?

[fol. 112] A Yes, sir.

Q Were they under arrest or under the two-hour detention law?

A They were under the two-hour detention law. However, warrants I believe had already been signed for Jenkins and Warner for night prowling.

THE COURT: All right, you may step down.

LEONA MARSHALL

LEONA MARSHALL, called as a witness on the part and behalf of the State, on voir dire, being duly sworn, was examined and testified as follows:

BY MR. CONNER:

Q Is it Miss or Mrs. Marshall?
A Miss.
Q Miss Marshall, what is your present address?
A 617 East 5th.
Q How long have you lived there?
A I moved there in June of 19—
MR. SNELLENBURG: We cannot hear the witness, your Honor.
THE WITNESS: In June of 1964.

[fol. 113] BY MR. CONNER:

Q Since June of 1964?
A Something like that, yes.
Q And do you own that house or do you rent that house?
A I rents.
Q And from whom do you rent that house?
A Dave Weiner.
Q David Weiner?
A Yes.
Q Do you pay the rent?
A Yes, I pay it now.
Q Did you sign the lease?
A I didn't sign no lease.
Q Do you recall March 16 and 17 of last year; were you living at that house then?
A Yes, I was.
Q And you were renting the house at that time; is that correct?
A That is right.
Q Do you remember the police coming to your house around that time?
A Yes, I do.

Q Did the police ask you if they could go inside your [fol. 114] house? When they first came did they ask you could they step inside your house?

A Well, when a knock came on the door I was in my bedroom so I went and answered the door and he showed me a badge and asks, "Is Thornton home?" I says, "Well, he said he was going to the store to get some wine," so they walked on in. Thornton, Cliff, Amos and Monroe and Shirley was sitting out front.

Q They were sitting there but what did the police say to you at this time?

A They only asked me was Thornton home, was Thornton and Clifford here. I said yes but I said Thornton was going to the store to get some wine, so they walked down there and when they went in, Thornton and Clifford and all of them was sitting in the dining room.

Q Now after this did they take you to the police station; did you go to the police station?

A Yes. I wasn't dressed and he said, "Get some clothes on." He said, "We are all going downtown."

Q When you got to the police station did you know who Sergeant Maloney was?

A No, I didnt' know one from the other.

Q Do you remember talking to one of the detectives at [fol. 115] the police station?

A Yes.

Q And at the police station did that detective ask you if he could search your house?

A Yes.

Q And what did you say?

A I told him yes.

Q Did you say anything else?

A No.

Q Do you remember saying to him, "Go ahead and do it because I know you can get a warrant anyway"?

A No.

MR. SNELLENBURG: Objection to leading questions, your Honor.

THE COURT: All right, that was leading, but she

answered "No" so I assume the defense makes no point of it.

MR. SNELLENBURG: No.

BY MR. CONNER:

Q Did you say anything else to him besides, "Go and search the house"?

A He asked, "Could I search the house?" I told him, "Yes."

Q Do you remember what else he told you? Did he [fol. 116] tell you you didn't have to let him search the house?

MR. SNELLENBURG: Objection to leading questions, your Honor.

THE COURT: That is leading.

MR. CONNER: Your Honor, under voir dire I was under the understanding that you could ask these questions.

THE COURT: It is still examining the witness and the rules apply whether the jury is here or not.

BY MR. CONNER:

Q Do you remember what else the detective said to you about the house and searching the house? If you don't remember, you can say so, but do tell us what you remember.

A No, I don't.

Q You don't remember?

A No.

Q Do you remember going in the police car down to the house?

A Yes, I do.

Q And did the police officers say anything to you about getting your permission to search when you got back to the house?

A No.

Q You are saying they didn't ask you again could they search or you don't remember whether they asked? [fol. 117] A They didn't ask me again.

Q They didn't ask you?

A No.
Q Just at the police station?
A They asked me before I left the police station.
Q And you said yes?
A Yes.
Q Did they make any threats or promises to you?
A No.
MR. CONNER: Your witness.

BY MR. HERNDON:

Q Miss Marshall, I think I recall your saying that you just had a housecoat on when the police officers arrived that morning; is that correct?
A That is right.
Q Now did the police officers say anything to you other than, "Are Clifford and Thornton here?"
A No, but he knocked on the door. As I said, he showed me this badge and he says, "Is Thornton and Clifford here?" I said, "They are out in the dining room." I said, "Thornton said he was going to get a bottle of wine," but when we walked in that room they was all sitting out there in front because I didn't know whether he had went out or not; so when he came in, Clifford and [fol. 118] Thornton stand up and I was sitting over by the table and he told me, he says, "Get some clothes on." He said, "We are all going downtown."
Q That is all he said to you about going downtown?
A Yes.
Q Did you feel that you had any choice as to whether or not you would go with the police officers?
A I didn't think I had no choice because I don't know what it was all about no way.
Q In other words, you felt you had to go with them?
A (There was no response.)
Q Did you feel that if the police officers told you to come along, you were going down and you had no choice?
A I didn't have no choice.
Q You felt you had to go?
A I guess so.

Q Is that all the police officers said to you, "Come on, get your clothes on; we are going downtown"?

A Yes.

Q In other words, he didn't ask you if you wanted to go or would you please go but you were just going to go?

A He said, "Get some clothes on; we are all going downtown."

[fol. 119] Q All right, now after you got down to the police station where were you taken?

A We was taken up to the Detective Division.

Q And where did you go in the Detective Division?

A Well, they took Cliff and Thornton. I don't know what—they took Cliff in one room right off by the hallway and took Thornton in the back room, and Amos, Monroe, Shirley and Jimmy Jones was sitting out in the hall.

Q Outside the Detective Division?

A That is right.

Q Did you feel you could leave any time you wanted to?

A No, because they had a police out there guarding all of use.

Q There was a police officer standing around you?

A That is right, right by the bench.

Q Was this a uniformed officer?

A That is right.

Q All right, did you go inside the Detective Division room after you had been sitting there a while?

A Yes.

Q And where did you go inside?

A Right in the—just as you walk in the door.

Q By a desk there?

[fol. 120] A Yes.

Q Detective Purnell's desk?

A I was sitting opposite his desk.

Q Now were you there when you were asked about going down to search at your property?

A Yes.

Q Was this the same detective who had told you to "Come along, we are going downtown" that asked you

about going down to search your property? Do you remember whether it was the same person or not?

A A detective with the grayish-looking hair.

Q Grayish-looking hair?

A Yes.

Q Do you remember what his name is?

A No, I don't know his name. I know him when I see him.

Q Did that police officer say anything to you while you were standing there by Lieutenant Purnell's desk about going down to your house?

A He just asked me could they go down and search the house and I told them yes.

Q Did he at any time advise you that you didn't have to let him search the house—

A No.

[fol. 121] Q —if you didn't want to?

A No.

Q He never advised you of that?

A No.

Q Did you feel you had no choice as to whether or not he would search the house?

A No.

Q Did the police officers say to you, or words to this effect, "We want you to take a ride with us down to your house"? Do you recall whether or not he said something like that? If you don't recall, say you don't recall.

A No, I don't.

Q As far as you are concerned you had no choice as to whether or not you would go and let them search the house; is that correct?

A That is right.

Q All right, now when you went down to the house with the police officers how many police officers were there, do you remember?

A There was two detectives that I was in the car with and after they got there they called some of those uniform officers. There was—

Q Let's stop for a minute, Miss Marshall. On the way [fol. 122] from the police station down to your house did

they ask you again whether or not they could search the house?

A Not as I recall, no.

Q When you got to the house did they ask you whether or not they could search the house again?

A No, because before we left I told them I would give them the key and let them go down there and they said, "No, you will have to go along with us."

Q Now when you got down there what did they say to you, if anything?

A They didn't say anything because—

Q Did they just tell you to unlock the door, or words to that effect?

MR. STONE: Let her complete her answers. Your Honor, talk about leading, this is as leading—

THE COURT: It is cross-examination.

MR. STONE: But he is actually stating an answer for her. Just let her finish her answers.

THE COURT: Let her finish.

BY MR. HERNDON:

Q Do you recall whether or not the police officers said anything to you when you got to the house?

A No.

[fol. 123] Q When you got to the house do you remember what you did?

A Yes.

Q What did you do?

A When I got out of the police car my door key was on a small string and it went down in the lining of my jacket and I couldn't find it right at the present time so I said, "Wait, maybe I can get in the back," so at that time my brother came up and he said, "What happened?" I said, "I am trying to get the door open," and I tried to open one of the windows and he said, "Feel in your coat pocket," so when I felt in my coat pocket I felt the key, you know, so I came back and opened the door and they went in and they called this uniform police and then they started searching the house.

MR. HERNDON: I have nothing further.

BY THE COURT:

Q Did Thornton Jenkins or Clifford Warner live at your house in March of last year, either one of them?

A Thornton was living there, yes.

Q Did he pay you rent?

A He is my boy friend; he was living there.

Q Did he pay you rent or was he living there at your invitation?

A He was paying the rent there.

[fol. 124] Q He was paying the rent in March?

A Yes, when he was working. I was going to school at the time, MDTA School.

Q I thought you said you paid the rent?

A I mean he gave me the—he gives me money and I pay the rent, me and him together, which pays the rent.

Q How do you pay your rent, by check or cash?

A By cash.

Q You give it to the landlord every month?

A Yes.

Q Who takes it to the landlord?

A I usually took it, or my son.

Q You yourself or your son?

A Yes.

Q And when you rented this place did you make the arrangements yourself to rent it?

A Which I didn't have the whole month's because where I was living at, the month wasn't up when I got this place, so I paid a deposit on it.

Q You made the arrangements by yourself, though, to rent the place where you live now? Thornton Jenkins didn't—

A No, I sent Thornton up there. I had done paid a deposit on it to hold it until the 8th of the month when [fol. 125] my rent was up where I was living at.

Q Who talked to the landlord to rent it?

A A friend of mine called there and got the place for me.

Q Well, you don't happen to remember who it was? That doesn't make any difference.

When the policeman asked you if he could search your house at the police station, you say you said yes?

A Yes, I did.

Q What did you think would happen if you said no?

A I don't know what would happen.

Q What did you think would happen?

A I don't know.

Q What do you think now would have happened if you had said no?

A I really don't know, to tell you the truth; I don't know too much about law.

Q When the police came to your door that morning were you afraid?

A I wasn't afraid.

Q Were you afraid when they took you downtown?

A No, because I didn't know what they were taking me down there for.

Q Were you afraid when you got downtown?

[fol. 126] A No.

Q Did any policeman ever do anything to make you afraid?

A No.

Q Did they yell at you?

A No indeed.

Q Threaten to hurt you?

A No.

Q Did you think they were going to hurt you?

A No, because they didn't have no reason to.

Q Did they treat you fairly?

A Yes, they did.

Q You weren't pushed around or hit or anything like that?

A No indeed.

Q Were you at any time afraid of the policemen, any of them?

A No, I wasn't afraid but I just didn't know what was going on.

Q You didn't know why you were going downtown?

A No, I didn't.

Q You hadn't done anything?

A No.

Q Is that what you mean?

A I haven't did anything and I didn't know what was [fol. 127] going on.

Q Did you know what they were hunting for when they searched your house?

A No, I didn't.

Q When you told them they could search your house why did you tell them they could; why did you say yes?

A Well, they asked me and I told them yes.

Q Why did you tell them yes?

A Because he asked me.

Q Did you know what you were saying when you said yes?

A Not particularly, no.

Q You didn't?

A Not exactly, no.

Q Didn't you know that you were agreeing to the officers' going and searching your house? You knew what you were doing; you knew when you said yes that you were telling the officers, "Yes, go ahead and search my house"?

A Yes, I told them they could search it.

Q You weren't afraid?

A No, I wasn't afraid. I haven't did anything.

THE COURT: Do you have any questions, Mr. Herndon?

MR. HERNDON: Just one or two, your Honor, suggested by your Honor's questions.

[fol. 128] BY MR. HERNDON:

Q Miss Marshall, I think I recall what you said, that the initial deposit, the first deposit you made on this place, was with money that Thornton gave you; is that right?

A That is right.

Q And that as far as you know the rent that was paid after that was money that Thornton gave you to go up and pay it with; is that right?

A Yes.

Q And the arrangements for renting the place were not made by you but by a friend; is that right?

A Yes, she called up and asked Mr. Weiner about this house. I saw the rent sign in the paper because he wanted $75 a month for it and she says, "She is a friend of mine" so he rented it to me for $65.

Q But the money that went for the rent was Thornton's money?

A Yes.

Q Now on one other aspect of the questions that the Judge has just asked you, at the time you said to the police officers that they could search the property did you feel you had any choice as to whether or not they would search?

A No, I didn't. Just like I told you, I didn't know too [fol. 129] much about law, which I didn't know what was going on in the beginning.

Q And they didn't explain it to you, either?

A No.

BY MR. CONNER:

Q Miss Marshall, how much is the rent a month?

A He rented it at $65 and after they passed this new tax law he went up $5 and I paid $70 a month.

Q You are still paying $70 a month?

A Yes, that is right.

Q Do you work?

A Sometimes.

Q Were you working back in March of '65?

A I have told you I was going to MDTA School.

Q What is that?

A The Government was training people for different jobs.

Q Where is that located?

A Where I was going was located on—between 13th and 14th on Walnut Street, used to be the old—

Q How many days a week did you go to school?

A Five days a week.

Q You weren't in school on this day, March 17, when the police came?

[fol. 130] A No, I wasn't.

MR. SNELLENBURG: If it please your Honor, the statement is contradicting and on an immaterial point as well.

BY MR. CONNER:

Q At any rate, March 15 was on a Monday—

A On a Monday—I graduated from that school on a Monday; I think it was the 15th or 16th.

Q Was Thornton Jenkins working at that time?

A He was working for Joseph Crisconi, so he stayed off Friday. He told him to take two days off next week because they didn't work that week.

Q What kind of work was Thornton Jenkins doing?

A Crisconi; garbage collection work is all I know, Joseph Crisconi.

Q Do you know what a search warrant is?

A Yes, when people search your premises. They didn't have no search warrant.

Q Do you know what one is?

A I mean I never been through this before; I never had my premises searched before.

Q But do you know what a search warrant is?

A I guess it would be a warrant to search your property, right?

[fol. 131] Q Right.

A Yes.

Q Now in this case did the men have a search warrant?

A No, they didn't.

Q Isn't the reason that you let them search the property because they could have gotten a search warrant?

MR. SNELLENBURG: Objection.

THE COURT: This is leading and you don't answer that question.

BY MR. CONNER:

Q State again, what was your relationship with Thornton Jenkins?

A He was my boy friend; I told you that.

Q He was your boy friend; how long had he been your boy friend?

A Well, we started going together in—let's see, it was October, '63 when we started living together, in August or September. We started August or September of '64, I believe it was.

Q In August of '64?

A I think so.

Q Do you remember all the conversations you had with the police?

[fol. 132] A No, not exactly.

Q You don't remember everything that was said?

A I don't remember everything. I am not going to say I do when I don't.

Q You don't remember what the police told you; you don't remember everything the police told you and you don't remember everything you told the police?

MR. SNELLENBURG: Objection; leading.

THE COURT: I agree it is leading. You don't have to answer that.

MR. SNELLENBURG: Nothing more, your Honor.

THE COURT: You may step down.

HARVEY W. GREGG, JR.

HARVEY W. GREGG, JR., called as a witness on the part and behalf of the State, on voir dire, being duly sworn, was examined and testified as follows:

BY MR. CONNER:

Q Mr. Gregg, by whom are you employed, sir?

A The Wilmington Bureau of Police.

Q And in what capacity are you employed by the police?

A I am a detective sergeant.

Q How long have you been a member of the Bureau of Police?

[fol. 133] A I am starting my 15th year this month.

Q Sergeant Gregg, did you participate in an investigation of an alleged homicide of one Brice Page on the date of March 17, 1965?

A Yes, sir, I did.

Q And what was your part in that participation?

A At 10:00 p.m. on that morning I was contacted by phone at my home by Lieutenant Purnell and responded to the Detective Division. I arrived in the Detective Division approximately 10:30 a.m. on the 17th. I was immediately assigned at that time to accompany Sergeant Maloney to 617 East 5th Street.

Q Did you do so?

A Yes, sir, I did.

Q And who else accompanied you besides Sergeant Maloney?

A Leona Marshall.

Q Upon arriving at 617 East 5th Street what took place?

A The three of us went down in a patrol car. We arrived there and Patrolman Maloney asked Leona Marshall in my presence if it was all right for us to go in and search her home, which it was determined that she controlled. He stated that we had no warrant and for the second time requested her permission to enter the house.

Q What was her reply?

[fol. 134] A She said, "Go ahead."

Q Did he tell her anything else at this time?

A To the best of my knowledge, no, sir.

Q Did she make any other remarks?

A No, sir, she did not. Correction on that; she did attempt to look for the key in our presence, couldn't find it, and she did state that we would have to go in through the back door. However, upon searching her person she did come up with a key to the front door.

MR. CONNER: Thank you, Sergeant.

MR. HERNDON: Nothing, thank you.

BY THE COURT:

Q How did you determine that she controlled the premises?

A I was informed, your Honor, by Sergeant Maloney, who had questioned her prior to my arrival in the Detective Division.

Q So so far as you know this determination was made simply after questioning her?

A Yes, sir, to the best of my knowledge.

THE COURT: That is all; you may step down.

THE COURT: Does the State have any further witnesses on this point?

MR. CONNER: For one thing, if your Honor wants [fol. 135] clarification as to the exact control of this property, whether it is a lease or not and who is actually the tenant, we are now checking to try to get the landlord to produce his records or come himself. If your Honor wants further evidence as to control, we would ask that this question be put aside until later and until we can have a chance to produce the actual landlord.

THE COURT: Do the defendants propose to call any witnesses on this point?

MR. SNELLENBURG: We have no witnesses, your Honor.

THE COURT: Mr. Herndon?

MR. HERNDON: None, your Honor.

THE COURT: Would you come to the Bench, please.

(There was a side bar conference, after which time a short recess was taken.)

DAVID L. WEINER

DAVID L. WEINER, called as a witness on the part and behalf of the State, on voir dire, being duly affirmed, was examined and testified as follows:

BY MR. CONNNER:

Q Mr. Weiner, would you state the nature of your business, sir.

A Real estate.

[fol. 136] Q Mr. Weiner, are you familiar with the premises located at 617 East 5th Street?

A Yes, I am.

Q And do you know who is the owner of that premises?

A I am the owner—the owner is the East Side Realty Company, which I own.

Q So you actually own the premises through one of your corporations?

A That is right.

Q Who is presently occupying that premises?

A The tenant's name is Leona Marshall.

Q And how long has she occupied that premises?

A Since June 1, '64.

Q Would you explain what rental agreement or arrangement you have with Leona Marshall.

A Well, the rental—

MR. HERNDON: Objection. I think it is a leading qeustion. We don't know with whom the rental arrangement was made.

THE COURT: I think the question is proper. You may proceed to answer it.

A The rental is $70 a month and it is paid each month.

Q Now with whom did you make this rental agreement?

[fol. 137] A Well, when the property was vacant, Leona Marshall came in to me and asked me if she could rent it and I said yes and she has been there since.

Q And who pays the rent to you?

A Leona Marshall.

Q Do you have any oral or written understanding with Leona Marshall as to sub-leasing?

A Well, I have a procedure with all the tenants that they are to tell me if they re-rent a room but it is not too enforced. I mean the point is I rent a house to a family and what happens from there on I just can't keep up with each one. I assume that it is her family that lives there.

Q Now would you state again, who has the responsibility for paying the rent for this premises?

A Leona Marshall.

Q Does the name Thornton Jenkins mean anything to you in connection with renting this property?

A Never, never heard of him.

MR. CONNER: Your witness.

BY MR. HERNDON:

Q Mr. Weiner, did you personally handle the renting of this property in June of '64?

A Well, it is quite a ways off and I could have or my [fol. 138] secretary could have. You mean when they first rented it?

Q Yes, sir.

A It could have been—I could have rented it to the individual, yes. There is people come in and out all the time. I might have, yes.

Q Do you know Mr. Jenkins, the gentleman, sitting on the right hand of the two officers, in civilian clothes in the front row?

A No.

Q You don't recognize him at all?

A No, I don't.

Q Do you recall whether or not any man came in and paid any rent at any time for this property during the early part of the lease?

A No, I don't.

Q You just don't recall?

A I feel that Leona—Leona Marshall is the individual that I knew all the time.

Q You have her name on your rent book; is that right?
A Yes, and I know her.
Q You don't recall anyone other than Leona Marshall coming in and paying the rent; is that right?
A Right, that is correct.
[fol. 139] THE COURT: Anything further of this witness, gentlemen?
MR. CONNER: Nothing further. We ask that he be excused.
THE COURT: You may step down and you may be excused.
Does the defense have any objection to excusing this witness?
MR. HERNDON: No, your Honor.
THE COURT: All right.

THE COURT: Gentlemen, do you want to make any remarks in connection with this matter? Does the defense want to make any remarks?
MR. HERNDON: Yes, your Honor.
Your Honor, this is with respect, of course, to our motion to suppress any evidence that may have been seized as an incident of the search. The objection is addressed to two facets of it. First of all, irrespective of Mr. Weiner's recognition of a particular individual as a tenant, the facts are that the defendant Thornton Jenkins was the one who paid the rent, and it seems particularly inappropriate to make any distinction here as to the person who was properly in control of the premises. It turns upon who went up to pay the rent or turns upon who the [fol. 140] lessor lists on his rent records as the tenant. I think basically the impropriety of such a type of distinction was recognized by your Honor's decision in Manetti, which went to the basic question of the right of a particular person to object to a particular search and seizure. The same rationale it seems is particularly appropriate here where we are trying to determine first of

all the question of who was in the control of the property. Therefore, factually on the basis of the person who actually paid the rent, from a practical and real viewpoint that person was the defendant Thornton Jenkins, and no one can waive his constitutional right to be immune from illegal searches and seizures except him. In other words, no other occupant of that property has the authority, nor has the State produced any evidence of such authority of any person to consent. Necessarily this is true here, more particularly because there is no husband-wife relationship between Miss Marshall and Mr. Jenkins; but beyond that point, even assuming a degree of control such as your Honor may or may not feel Miss Marshall had, the fact is that nobody can consent to a search where its objective is to seize as evidence that which is the property of some other occupant of the property. In other words, consent to a search can only be given by one who could have resisted the search as an invasion of his personal rights or somebody specifically authorized by him to consent to that search, and there are a number of decisions which support this view.

[EXCERPTS FROM THE TESTIMONY OF SGT. JOHN T. OGDEN]

[fol. 283] SERGEANT JOHN T. OGDEN

SERGEANT JOHN T. OGDEN, called as a witness on the part and behalf of the State, on voir dire, being duly sworn, was examined and testified as follows:

BY MR. CONNER:

Q Sergeant Ogden, by whom are you employed?
A Department of Public Safety, Bureau of Police.
Q How long have you been a member of the Department of Public Safety, Bureau of Police?
A Over 14 years.

Q What rank do you hold, sir?

A Sergeant of Detectives.

Q I call your attention to March 17 of 1965 and ask you were you on duty on that night?

A I was.

Q What was your assignment on that date, sir?

A Investigate an incident at the junk yard at 503 South Market Street.

Q As a part of your investigation did you have an occasion to interview or have conversation with one Thornton Jenkins and one Clifford Warner?

A I did.

* * * *

[fol. 301] THE COURT: I will turn this entire matter over to the defense. Here is a note that is not this witness' note and I will give it back to the State. That tablet will be kept intact and returned to the officer.

MR. SNELLENBURG: Yes, sir.

MR. HERNDON: We will go ahead while he looks at it.

BY MR. HERNDON:

Q Sergeant Ogden, am I correct in concluding that there were three occasions on which you interviewed or interrogated Thornton Jenkins, is that correct, on March 17 of 1965?

A I would say that that is correct, yes, sir.

Q And wh[redacted] was the first occasion on which you interrogated hi[redacted]

A 11:30 a.m.

Q And who was present at the time of that interrogation other than yourself and Jenkins?

A Just the defendant and myself.

Q Where was the defendant physically located in the Detective Division at the time of that interrogation, if you recall? Was he in a separate room by himself?

A Yes.

Q Was the door shut?

A It may have been.

[fol. 302] Q You don't recall?

A Not right offhand.

Q Now what was the first thing you said to the defendant when you walked into this room? When I say "the defendant," I mean Jenkins on this occasion.

A I believe I pulled my badge out of my pocket and identified myself as Sergeant Ogden.

Q Then what did you say to him?

A I told him I was interested in his activity on the evening preceding being picked up by the police and told him that he was under arrest on a charge of night prowling and that he didn't have to say anything or make any statements, that he had a right to an attorney and that anything he said might be used in a court of law either for or against him.

Q You didn't mention at that point that you were investigating either a burglary or a homicide?

A At that point, that is correct, I didn't mention a homicide or a burglary.

Q At that point what if anything did the defendant say to you?

A He told me a story as to his activities prior to being picked up by the police the night before, and actually, to sum it up, he said that he was with Clifford Warner, they [fol. 303] left 617 East 5th Street where he lived, and they walked to Klund and Pine, that they wanted a bottle of wine. However, they didn't have any money. They looked in the bar looking for George, the owner. George wasn't about so they left there and walked to South Market Street where they were picked up by the police, but his direction of travel differed from the direction of travel from the previous person interviewed.

Q Which was Warner?

A Which was Warner, that is correct.

Q And this is the sum and substance of what he told you?

A At that time, that is correct.

Q Did you on that occasion or prior to the commencement of your questioning of him advise him that he had

the right to counsel appointed by the Court in the event he was not able to obtain counsel of his own choosing?

A I did not.

Q Did you say anything with respect to the right of counsel other than the fact that "You have the right to counsel"?

A I may have said "counsel" or I may have said "an attorney."

Q But you did not advise him that he had a right to have counsel supplied to him on this occasion?

A That is correct.

[fol. 304] Q Did you on any occasion, that is, on March 17, advise him of any such right?

A I don't recall advising him.

Q Would you recall if you had?

A I believe I would, yes, sir.

Q Therefore, your conclusion is that you did not so advise him?

A That is correct.

Q Now what was the second occasion on which you saw the defendant Thornton Jenkins on March 17, 1965?

A At or about 2:50 p.m., when I read the defendant Clifford Warner's statement to him in the presence of Sergeants Lingle and Maloney.

Q And what if anything did you tell him prior to reading this statement to him?

A He was informed he was under arrest on a charge of murder and burglary and again he had a right to legal counsel, and anything he said might be used in a court of law for or against him.

Q In other words, this is sort of a standard rigmarole you go through; is that right?

A Yes.

Q And did you do anything other than read the War-

[fol. 305] ner statement to him on this occasion?

A Just jotted down the remarks that he made.

Q Remarks he made of what kind? First of all, in response to the Warner statement?

A Yes.

Q. And what were those remarks; do you recall?

A His remarks were that it was Clifford that went into the junk yard first and that he didn't have any knife, I believe, in his belt. I think that was his words, "I didn't have any knife in my belt."

MR. HERNDON: Excuse me, your Honor; I am not used to the sergeant's system here.

BY MR. HERNDON:

Q He didn't expressly agree with the other statements made by the Warner statement; is that correct? In other words, he said there were two errors in it; isn't that—

A That is correct.

Q And beyond that he made no comment?

A That is correct.

Q And the two errors that he claimed that were in the Warner statement were the recitation in it that he, that is Jenkins, had a knife and second, that the defendant Warner did not go into the premises of the junk yard?

[fol. 306] A No, sir, that is not what I said. Thornton Jenkins' remarks, as I recall at that particular time in reference to Clifford Warner's statement was that "It was Clifford who went through the fence first, not me," meaning Thornton, and that "As far as a knife goies, I didn't have a knife in my belt."

[fol. 324] MR. HERNDON: Your Honor, before calling the next witness the State and myself as attorney for Thornton Jenkins have stipulated as to one fact which will eliminate our calling Captain McDonald for purposes of voir dire, and those facts are that defendant Thornton Jenkins was apprehended at 9:30 to 10:00 a.m. on March 17, 1965, that he was charged with night prowling at 11:00 a.m. and charged with burglary in the fourth degree and murder in the first degree at 1:15 p.m. on March 17 and the written statement was taken subsequent to 7:00 p.m. on that day, and that these facts are disclosed by the docket slips of the Police Department.

MR. STONE: So stipulated.

THE COURT: All right.

[EXCERPTS FROM TESTIMONY OF THORNTON JENKINS]

[fol. 331] THORNTON JENKINS

THORNTON JENKINS, one of the Defendants, called as a witness on his own behalf, on voir dire, being only sworn, was examined and testified as follows:

BY MR HERNDON:

Q. Mr. Jenkins, you have been sitting here while Sergeant Ogden was testifying, have you not?

A Yes.

Q On any time during the day of March 17, 1965, were you advised by any officer of the Wilmington Police Department or by any person in authority of your rights to remain silent?

A No.

Q Were you warned of your right to counsel in any way?

A No.

Q That you had a right to a lawyer?

[fol. 332] A No.

Q Did you know that you had the right to an attorney?

A No.

Q Were you told that you could consult with counsel, an attorney, before making any statement?

A No.

Q At the time you made or signed the written statement that has been referred to here, did you think you had any choice as to whether or not you would give a statement?

A No.

Q When was the first time you were advised of your right to have an attorney?

A I was advised on the 18th of March when I went into Municipal Court by Judge Clark.

Q And what advice did he give you; what did he say to you?

A He asked us did we have an attorney. I told him no, and then he explained—

Q Did he ask you if you wanted an attorney?

A Yes.

Q What did you say?

A I told him yes.

Q What happened then?

[fol. 333] A He said he would appoint one from the Court.

Q And was an attorney subsequently appointed?

A Yes.

Q Who was that?

A You, Mr. Herndon.

Q And this was the first occasion on which you were told of your right to have an attorney?

A Yes.

Q And to consult with an attorney?

A Yes.

Q And this was the first time you knew you didn't have to give a statement?

A Yes.

MR. HERNDON: Thank you.

BY MR. CONNER:

Q How far did you go in school?

A About 9th grade.

Q Can you read and write?

A Yes.

Q I hand you a piece of paper and ask you is that your signature I am pointing to?

A Yes.

Q Do you remember writing that?

A Yes.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Rec'd. 3/27/67

No. 28, 1966

THORNTON A. JENKINS,
DEFENDANT BELOW, APPELLANT

v.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

No. 33, 1966

CLIFFORD WARNER,
DEFENDANT BELOW, APPELLANT

v.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

(March 27, 1967)

WOLCOTT, Chief Justice; CAREY and HERRMANN, JJ., sitting.

Upon appeals from Superior Court judgments of conviction of burglary and murder. Reversed as to the murder convictions; affirmed as to the burglary convictions.

Henry N. Herndon, Jr. of Morris, James, Hitchens & Williams, Wilmington, for Thornton A. Jenkins, defendant below, appellant.

Richard J. Baker, Wilmington, for Clifford Warner, defendant below, appellant.

F. L. Peter Stone and Jay H. Conner, Deputy Attorneys General, for the plaintiff below, appellee.

HERRMANN, Justice:

Thornton A. Jenkins was convicted of murder in the first degree and burglary in the fourth degree. Clifford

Warner was convicted of murder in the second degree and burglary in the fourth degree. They were tried together and they appeal jointly.

Jenkins and Warner were arrested on the morning of March 17, 1965. Earlier, the police discovered the victim of an apparent homicide in a junkyard in Wilmington; death had occurred during the previous night. The arrests were made because police had found Jenkins and Warner loitering near the junkyard the prior evening.

Although the jury recommended mercy, the Trial Judge disregarded the recommendation and Jenkins was sentenced to death upon the first degree murder conviction;* a sentence of five years imprisonment was imposed on the burglary conviction. Warner was sentenced to life imprisonment upon the second degree murder conviction and to five years imprisonment on the burglary conviction.

Other pertinent facts will be stated in the discussion of the grounds of appeal to which they relate.

I.

The dispositive issue as to Jenkins' appeal from the conviction of first degree murder is whether the evidence was sufficient to support the conviction. We think not.

The State proved that the victim was killed by the blow of a blunt instrument on the head; there was no evidence of the weapon used. Other injuries included abrasions and contusions of the face with lacerations of the mouth and chin; on the neck there was a cut five inches long; the nose and cheek bones were fractured as were several ribs; the liver was ruptured. The State argues from this that the evidence shows that the assailant cut the victim's throat and kicked or stomped him.

Except for testifying on *voir dire* regarding the taking of his written statement, Jenkins did not take the stand at trial. In his statement, Jenkins admitted that he was in the junkyard with a companion at about 8:00 o'clock

* The defendant challenges the power of the Trial judge to disregard the recommendation of mercy. In view of the conclusion reached herein, this issue has become academic.

on the night before his arrest, stealing wire and fire extinguishers. He related that, while in the yard near the office, he heard the telephone ring and observed a shadow through an office window; that he and his companion ran across the yard and hid near a crane; that as they attempted to leave the yard, he was struck on the arm by someone whom he thought was the night watchman; that he and his companion "grabbed" the man, he from one side and his companion from the other; that there was a struggle and the man fell to the ground. According to the statement, Jenkins did not have a weapon nor did he see a weapon; he did not recall the watchman saying anything because he had been drinking all day.

Jenkins' statement plus the testimony as to the nature of the victim's wounds constituted the only evidence in the case that could be related to express malice aforethought, an essential element of first degree murder in this State.* We find such evidence insufficient to prove express malice aforethought.

The elements of express malice aforethought were stated by this Court in *Bantum* v. *State*, 7 Terry, 487, 85 A.(2d) 741 (1952) as follows:

> ". . . in addition to malice (which is common to both degrees of murder) there must exist the elements of formed design or intention to kill or to do great bodily harm and the sedate and deliberate mind of which the intention to kill or do great bodily harm is the product. Each of these elements must be proved by external circumstances, that is by circumstances other than the mere fact of the killing which fact, at common law, itself gave rise to an inference of malice (IV Blackstone, 201). Each element, together with malice, must be present and proved beyond a reasonable doubt."

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* *11 Del. C.* § 571 provides:

"§ 571. Murder in the first degree

"Whoever commits the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate the crime of rape, kidnapping or treason, is guilty of murder in the first degree and of a felony, and shall suffer death."

In *State* v. *Gardner*, —— Storey ——, 203 A.(2d) 77 (1964), the elements of express malice were restated by this Court as follows:

> ". . . express malice consists of 3 elements: (1) malice; (2) a formed design or intention to kill or to do great bodily harm; and (3) a sedate and deliberate mind of which that intention is the product."

The defendant concedes that an unexplained killing may give rise to the presumption of an element of malice. But it is asserted that the circumstantial evidence in this case was insufficient to prove the other two requisite elements of express malice aforethought. We agree because of that which was not proved as well as that which was proved.

First, there was no evidence fulfilling any of the accepted grounds upon which courts permit the inference of a "formed design or intention to kill or to do great bodily harm" and "a sedate and deliberate mind of which that intention is the product." There was no evidence that Jenkins knew, or had any prior connection with, the victim. There was no evidence of deliberate selection and use of a deadly weapon; or of a lying in wait; or of antecedent threats. There was no proof of hatred, ill will, spite, or jealousy; or of a plan or scheme to kill or to do great bodily harm. See *Bantum* v. *State*, *supra*; *State* v. *Winsett*, —— Storey ——, 205 A.(2d) 510, aff'd. 222 A.(2d) 781 (1966).

Secondly, the elements of express malice were not proved by the evidence adduced in the case. To establish a fact in issue, circumstantial evidence must be inconsistent with any other rational conclusion. *Holland* v. *State*, 9 Terry 559, 107 A.(2d) 920 (1954); *Patrick* v. *State*, ——Del. ——, —— A.(2d) —— (1967). We are unable to say that the circumstantial evidence before us is inconsistent with any rational conclusion other than that Jenkins had a "formed design or intention to kill or to do great bodily harm" to the victim and a "sedate and deliberate mind of which that intention is the product."

Taken at its best from the State's point of view, the evidence and inferences possible therefrom prove that the victim, a stranger to Jenkins, was badly beaten and died

of his wounds. The evidence adduced is equally consistent with a killing perpetrated without design or premeditation, though with a "depraved heart", or a "cruel and wicked indifference to human life." See *State* v. *Winsett*, *supra*. This is tantamount, of course, to saying that the evidence is as reasonably consistent with implied malice and second degree murder * as with express malice and first degree murder. It follows that the circumstantial evidence in this case is insufficient to support a conviction of first degree murder.

Accordingly, it is the opinion of the Court that Jenkins' conviction of murder in the first degree must be reversed and the case remanded for new trial.

II.

The dispositive issue of Warner's appeal from the conviction of second degree murder is whether the jury was properly instructed regarding the "felony-murder" rule. The charge to the jury in this respect was as follows:

> ". . . when one or more persons is engaged in the commission of a felony and there is an unintentional killing, the law will imply malice from the fact that a felony was committed and murder in the second degree will result."

In response to the jury's inquiry made several hours after it retired to deliberate, the Trial Judge charged:

> "Now talking again in the abstract, if two men set out to burglarize a place, let's say a building just for the purpose of this example, and that's all they set out to do, commit a burglary, and one stays outside as a lookout and one goes inside, and the one inside unintentionally kills somebody, then both per-

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* *11 Del. C.* § 572 provides:

"§ 572. Murder in the second degree

"Whoever commits the crime of murder, other than murder in the first degree, is guilty of murder in the second degree and of a felony, and shall be imprisoned for life, and may be fined in such amount as the court, in its discretion, may determine."

sons are guilty of second degree murder. The fact that a felony was being committed implies the malice so we have implied malice and hence second degree murder. . ."

It is our opinion that these jury instructions constituted reversible error.

Under the common law felony-murder rule, any homicide committed in the perpetration of any felony constituted murder. The question before us is whether the common law rule prevails in this State, unlimited and unqualified.

The felony-first degree murder rule is expressly limited by Statute to three felonies: rape, kidnapping and treason. *11 Del. C.* § 571, *supra.* The defendant contends that the enumeration of three types of felonies in § 571 manifests a legislative intent to abolish the felony-murder rule as to all other felonies. We disagree.

A felony-second degree murder rule has long been recognized in Delaware. E.g., *State* v. *Brown*, 1 Houst. Cr. Cas. 539, 551 (1878) (obstructing railroad tracks); *State* v. *Lodge*, 9 Houst. 542, 33 A. 312 (1892) (abortion); *State* v. *Blackburn*, 7 Penne. 479, 75 A. 536 (1892) (robbery); *State* v. *Fleetwood*, 6 Penne. 153, 65 A. 772 (1906) (abortion); *State* v. *Harris*, 3 W. W. Harr. 236, 134 A. 693 (1923) (robbery). In 1958, when capital punishment was abolished in this State, the felony-murder aspect of the first degree murder statute was amended by specifying "the crime of rape, kidnapping or treason" in place of "any crime punishable with death", the language of the earlier § 571.* *51 Del. Laws*, Chap. 347. It is clear on the face of that Statute that this change developed from the abolition of capital punishment,** and

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* Prior to 1958, *11 Del. C.* § 571 provided:

"§ 571. Murder in the first degree

"Whoever commits the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, is guilty of murder in the first degree and of a felony, and shall suffer death.

** The death penalty was returned to § 571 when capital punishment was reinstated in Delaware in 1961. *53 Del. Laws*, Chap. 310.

not from a legislative intent to abolish the felony-murder rule generally.

We conclude that by § 571 the General Assembly intended to prescribe the scope of the felony-first degree murder rule; that the long-standing felony-second degree murder rule was not abrogated by the Statute.

Upon this appeal, therefore, we are called upon to examine into the scope of the felony-second degree murder rule. Is it limited to common law felonies, as the defendant here contends in pointing out that burglary in the fourth degree is a statutory felony? And do all types of felonies come within the rule; or only those inherently and foreseeably dangerous to human life; or only those having a proximate causal connection with the death?

The common law felony-murder rule arose in England when practically all felonies were punishable by death. If the intended crime was a felony, its felonious design was imputed to the act actually committed; and if the act committed was a homicide, it became murder since it was immaterial whether the offender was hanged for one felony or another. 3 Coke Inst. 56 (1797); *Powers* v. *Commonwealth*, 110 Ky. 386, 61 S.W. 735 (1901).

With the general trend toward mitigation in the severity of punishment for many felonies, and with the addition of many statutory felonies of a character less dangerous than was typical of most common law felonies, the irrationality and unfairness of an unlimited felony-murder rule became increasingly apparent.

As early as 1862, the requirement of a proximate causal connection between the felony and the homicide was recognized by the English courts. *Reg.* v. *Horsey*, 3 F. & F. 287. This limitation was adopted in several American jurisdictions. E.g., *Burton* v. *State*, 122 Tex. Cr. 363, 55 S.W.(2d) 813 (1933); *State* v. *Weinsengoff*, 85 W. Va. 271, 101 S.E. 450 (1919); *State* v. *Glover*, 330 Mo. 709, 50 S.W.(2d) 1049 (1932).

Again taking the lead, the English courts further limited the felony-murder rule to felonies inherently and foreseeably dangerous to life. In the leading case of *Reg.* v. *Serne, et al.*, 16 Cox.Cr.Cas. 311 (1887), the jury was charged:

". . . [I]nstead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder."

See also *Reg.* v. *Whitmarsh*, 62 Just. P. 711 (1898). The *Serne* limitation also found favor in a number of American jurisdictions. E.g., *People* v. *Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924); *People* v. *Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931); *Williams* v. *Commonwealth*, 258 Ky. 830, 81 S.W.(2d) 891 (1935).

In California, both the foregoing limitations were adopted. The California rule has been stated as follows: a homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (except felonies enumerated in the first degree murder statute) constitutes at least second degree murder.* E.g., *People* v. *Ford*, 36 Cal.Rptr. 620, 388 P.(2d) 892 (1964); *People* v. *Williams*, 47 Cal.Reptr. 7, 406 P.(2d) 647 (1965); *People* v. *Washington*, 44 Cal.Rptr. 129, 402 P.(2d) 130 (1965).

In our judgment, the California rule is supported by logic, reason, history, and common sense.** The only ra-

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* Such limitations upon the felony-murder rule are favored by students of the subject. See 3 Stephen, *History of the Criminal Law of England*, pp. 57, 74-76 (1883); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U.Pa. L. Rev. 50; Perkins, *A Re-Examination of Malice Aforethought*, 43 Yale L.J. 537, 563 (1934); Moreland, *The Law of Homicide*, p. 224 (1952); compare Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 701, 713-715 (1937).

** There are statutory felonies, such as forgery and counterfeiting (*11 Del C.* §§ 541-544), embezzlement, (*11 Del. C.* § 636), pandering (*11 Del. C.* § 733), and pimping (*11 Del. C.* § 736), as to which an unqualified felony-murder rule would be incongruous. The same may be said as to comparatively minor common law felonies, such as pick-pocketing and petty thefts. In this connection, we note *11 Del. C.* § 101(b) providing: "Any crime or offense not specifically designated by law to be a felony is a misdemeanor."

tional function of the felony-murder rule is to furnish an added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death. This function is not served by application of the rule to felonies not foreseeably dangerous. The rule should not be extended beyond its rational function. Moreover, application of the rule to felonies not foreseeably dangerous would be unsound analytically because there is no logical basis for imputing malice from the intent to commit a felony not dangerous to human life.

It is the opinion of the Court, therefore, that the felony-second degree murder rule of this State should be limited to homicides proximately caused by the perpetration or attempted perpetration of felonies which are, by nature or circumstances, foreseeably dangerous to human life, whether such felonies be common law or statutory. We find no valid reason for distinguishing in this connection between felonies having common law origins and those purely statutory.

Whether the commission of a particular felony in a given instance was foreseeably dangerous is for the jury to decide. In that determination, both the nature of the felony and the circumstances of its commission are relevant factors. Burglary in the fourth degree * may, or may not, be foreseeably dangerous to human life, depending upon whether someone may be reasonably expected to be present in the building, and upon other circumstances of the case. We hold that the Trial Court erred when it charged the jury that second degree murder may arise from the perpetration of any felony, without regard for the nature of the felony, the circumstances of its commission, or the causal connection between the felony and the homicide. The second degree murder conviction of Warner must, therefore, be reversed and the cause remanded for new trial.

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* Burglary in the fourth degree involves the breaking and entering of a building other than a dwelling house, the subject of the other three degrees of burglary. *11 Del. C.* §§ 391-395.

III.

The foregoing are the only questions that need be decided for disposition of the appeals from the murder convictions. While it is unnecessary to decide the other questions raised on the appeals, we discuss them nevertheless for the guidance of the Trial Court on the new trial.

The Search and Seizure

Jenkins and Warner were taken into custody, together with Leona Marshall and others, at 617 East Fifth Street, Wilmington, at about 10:00 A.M. No search was made of the house at that time. The house was rented by Miss Marshall; she was the sole tenant insofar as the landlord was concerned. Jenkins was her boyfriend, lived in the house with her, and gave her money for the rent. Upon arrival at the police station, Jenkins and Warner were taken to separate rooms. The police asked Miss Marshall for her consent to search the house; she gave her consent and returned with them. Jenkins was not asked for his consent to the search of the premises. Accompanied by Miss Marshall, the police searched the premises and several articles were seized. There was no search warrant and the search was not made incident to an arrest.

At trial, the defendant objected to admission in evidence of the articles seized, on the grounds that the search and seizure was neither pursuant to a search warrant, nor incident to arrest; that the right against an unlawful search is a personal right which only the defendant could waive; that the search without Jenkins' consent constituted an unreasonable invasion of his privacy in violation of his constitutional rights under the Fourth and Fourteenth Amendments. *Rickards* v. *State*, 45 Del. 573, 77 A.(2d) 199 (1950). The Trial Judge overruled the objections, holding that the consent of Miss Marshall, who was also an occupant of the premises and the legal tenant, was sufficient to uphold the search.

On the appeal, the defendant contends that (1) Miss Marshall's consent was not voluntary, and (2) even if voluntary, it was not an effective waiver of the defendant's rights.

We find the defendant's first contention without merit. Upon review of the record, we are satisfied that there is sufficient evidence to support the Trial Court's conclusion that Miss Marshall's consent was voluntarily given. The admission of the evidence seized is not vulnerable on this ground.

The defendant's second contention raises this question: May the consent of a third person to a search and seizure bind a nonconsenting party?

Where the consenting person possesses "sufficient control" over the premises searched, a large body of state and federal decisions uphold the constitutionality of the search and seizure, and permit the use of the seized evidence against a nonconsenting party. See *Annotation, 31 A.L.R.(2d)* 1078; *Third Party Consent to Search & Seizure*, 33 U.Chi.L.Rev. 797, 801 (1966).

"Sufficient control" is sometimes predicated upon the agency concept of implied consent or apparent authority. E.g., *Bielicki* v. *Super. Ct. of Los Angeles Co.*, 21 Cal. Rptr. 552, 371 P.(2d) 288, 291 (1962); *U.S.* v. *Eldridge* (4 Cir., 1962) 302 F.(2d) 463. The theory is that the third person was apparently authorized by the nonconsenter to waive his rights. This approach has been criticized recently by the United States Supreme Court in *Stoner* v. *California*, 376 U.S. 483, 84 S.Ct. 889, 893 (1964), where the Court stated: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'." See also *Roberts* v. *U.S.* (8 Cir., 1964) 332 F.(2d) 892.

"Sufficient control" is more frequently predicated upon a joint and equal possession and control of the premises searched.* The line of reasoning which underlies the joint

* The cases often involve spousal relationships, but are not limited thereto. For cases upholding a wife's consent as against her husband, see E.g., *State* v. *Caire*, 74 R.I. 377, 60 A.(2d) 841 (1948); *People* v. *Harvey*, 48 Ill. App.(2d) 261, 199 N.E.(2d) 236 (1964); *Bellam* v. *State*, 233 Md. 368, 200 A.(2d) 344 (1964); *People* v. *Carter*, 48 Cal.(2d) 737, 312 P.(2d) 665 (1957); *U.S.* v. *Heine* (2 Cir., 1945) 149 F.(2d) 485; *U.S.* v. *Sergio* (E.D. N.Y. 1937) 21 F.Supp. 553. It has been recognized that it is not the marital

control doctrine may be stated as follows: the consenting person has the authority, acting in his own behalf and not as agent for the nonconsenter, to permit a search of premises to which he has immediate right of possession and control; a search pursuant to such consent is reasonable, absent other circumstances tending to make it unreasonable; evidence that is the product of a reasonable search may be used against anyone. Thus, where two or more persons having joint and equal possession and control of the premises, the prevailing rule is that any one of them may consent to a search; and the evidence thus disclosed may be used against anyone.

Accepting the possession and control rule, as we do, where the consenting person has more than joint and equal possession and control of the premises, *a fortiori*, he has sufficient control to bind other occupants by his consent to a search. Thus, in *Burge* v. *U.S.* (9 Cir., 1965) 342 F.(2d) 408, the consent of the lessee of an apartment was held to bind the guest-occupant. And, in *State* v. *Malcom*, —— Del. ——, 203 A.(2d) 270 (1964), the Superior Court held that the parent could effectively bind her minor son by her consent to a search of the home. See also *State* v. *Kindermann*, 271 Minn. 408, 136 N.W.(2d) 577 (1965); *Maxwell* v. *Stephens* (8 Cir., 1965) 348 F.(2d) 325.

Returning to the case at hand: although Miss Marshall and Jenkins were joint occupants, it is clear that Miss Marshall, as sole legal tenant, had a superior right of possession and control. By virtue of that superior right,

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status, but rather the joint control and possession of the couple's premises that establishes the wife's authority to give an effective consent. See *Roberts* v. *U.S.* (8 Cir., 1964) 332 F.(2d) 892; *State* v. *Hall*, —— N.C. ——, 142 S.E.(2d) 177 (1965); *People* v. *Perroni*, 14 Ill.(2d) 581, 153 N.E.(2d) 578 (1958). For cases not involving spousal relationships, but nonetheless upholding third person consent on the basis of joint control, see E.g., *U.S.* v. *Sferas* (7 Cir., 1954) 210 F.(2d) 69 (partner of defendant); *Nestor* v. *State*, —— Md. ——, 221 A.(2d) 364 (1966) (co-tenant with defendant); *People* v. *Howard*, 166 Cal.App.(2d) 688, 334 P.(2d) 106 (1958) (mistress of defendant); *People* v. *Silva*, 140 Cal.App.(2d) 791, 295 P.(2d) 942 (1956) (brother of defendant's mistress who lived on the premises).

it is our conclusion that she was able to give effective consent to a search of the premises. Because of her consent, the search was reasonable and the product of that search was admissible in evidence against Jenkins.

The defendant places principal reliance upon *Stoner* v. *California, supra,* wherein the United States Supreme Court emphasized the personal character of the right against unreasonable search and seizure. There, the Court held that a hotel desk clerk could not properly authorize the police to search the defendant-hotel guest's room. *Stoner* is distinguishable on its facts in that the consenting party's right of control and possession was inferior to that of the nonconsenting party. The defendant also cites *State* v. *Pina,* 94 Ariz. 243, 383 P.(2d) 167 (1963); *Burge* v. *U.S.* (9 Cir., 1964) 333 F.(2d) 210; *Tompkins* v. *Superior Court, etc.,* 27 Cal.Rptr. 889, 378 P.(2d) 113 (1963); *U.S.* v. *Rykowski,* (S.D. Ohio, 1920) 267 F. 866; *Cofer* v. *U.S.* (5 Cir., 1930) 37 F.(2d) 677. The *Burge* case was reversed upon reargument, see 342 F.(2d) 408; the other cited cases are factually inapposite.

The Right to Counsel

The defendants contend that because they were not advised of the right to have counsel appointed to advise them at the police station, the incriminating statements taken from them were admitted in evidence unlawfully. The defendants rely upon *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

The trial of the cases before us commenced on January 10, 1966. It is settled now that *Miranda* will be applied in Delaware only in those cases the trial of which commenced after June 13, 1966. *Parson* v. *State,* —— Del. ——, 222 A.(2d) 326 (1966); *Priest* v. *State,* —— Del. ——, —— A.(2d) —— (1967). Accordingly, *Miranda* is not applicable in the instant cases.

The defendants further argue that their convictions should be reversed because the Trial Court failed to apply the standards set forth in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758 (1964), in determining (1) whether their statements were given voluntarily, and (2) whether they had been denied the right to counsel.

The first contention is based upon the unfounded supposition that *Escobedo* in some way altered the traditional test of voluntariness. The record shows that, after *voir dire* examination, the Trial Judge found that the statements were voluntary. *Jackson* v. *Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964). Upon review of the record, we conclude that there was sufficient evidence to support that finding. We find nothing inadequate or improper in the inquiry on voluntariness, by reason of either *Escobedo* or *Jackson*.

As for the defendants' second contention, it is conceded that neither of the defendants requested counsel at the police station. As we have frequently held, *Escobedo* will be limited in application to its own factual situation. *King* v. *State*, —— Del. ——, 212 A.(2d) 886, (1965); *Parson* v. *State*, —— Del. ——, 222 A.(2d) 326 (1966). In *Escobedo*, there was a request to consult retained counsel at the police station; since no such request was made here, *Escobedo* is inapplicable in the instant cases.

The Joint Trial

Jenkins contends that he was deprived of a fair and impartial trial because he was tried jointly with Warner.

Both defendants were indicted for first degree murder. At an early pre-trial stage, Jenkins moved for severance under Superior Court Criminal Rule 14,* asserting *inter alia* that Warner's written statement incriminated himself and implicated Jenkins; that the admission of Warner's statement at a joint trial would render the trial unfair as to Jenkins. The motion was denied.

The substance of Jenkins' statement is above. According to Warner's statement, he and a companion (whose

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* Superior Court Criminal Rule 14 provides:

"RULE 14. RELIEF FROM PREJUDICIAL JOINDER

"If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires."

name was stricken * from the statement at the trial) went to the junkyard on the night of the killing to steal wire and fire extinguishers; the companion went through the fence into the junkyard alone; Warner remained outside the fence; the companion passed the stolen goods through the fence to Warner who loaded them into an automobile; they left together.

The written statements of both defendants were admitted in evidence; neither took the stand at the trial except upon the issue of the voluntariness of the statements. The specific prejudice claimed by Jenkins is that Warner's statement, admitted over Jenkins' objection, blamed the killing upon Jenkins because it located Jenkins alone inside the junkyard and Warner outside. Jenkins asserts that it was clear from an inquiry by the jury,** and from the verdicts, that the jury was influenced by the Warner statement as to the degree of culpability and credibility of each defendant.

We agree that Jenkins' trial on the murder charge may have been rendered unfair by the admission of the Warner statement in the joint trial. In view of the nature and circumstances of this case, it is our opinion that the severance should have been granted.

A motion for severance is addressed to the sound discretion of the trial court. Ordinarily, defendants indicted jointly should be tried together; but, if justice requires it, the trial court should grant separate trials. *Garner* v. *State*, ——. Del. ——, 145 A.(2d) 68 (1958). What constitutes abuse of discretion depends upon the facts and circumstances of each case. *Burton* v. *State*, 1 Storey 546,

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* The attempt to delete notwithstanding, Jenkins' name was legible, we think, to a juror with knowledge gained from Jenkins' statement and other evidence. As a practical matter, even a complete obliteration would have failed to effectively conceal Jenkins' implication, in view of other evidence in the case. Compare *People* v. *Serritello*, 385 Ill. 554, 53 N.E.(2d) 581 (1944).

** During its deliberations, the jury sent to the Court the following inquiry:

"If a man is acting as lookout at a burglary and a murder is committed during the burglary, is the lookout equally guilty of murder even though the murder took place out of his sight?"

149 A.(2d) 337 (1959); *Weekley, et al.* v. *State*, —— Del. ——, 222 A.(2d) 781 (1966). As a general rule, however, it may be said that discretion has been abused by denial of severance when there is reasonable probability that, because of a co-defendant's extra-judicial statement, substantial injustice and denial of fair trial may result from a joint trial.

Ordinarily, an abuse of discretion will not arise from the mere fact that the confession or admission of a co-defendant, implicating the moving defendant and not admissible against him, will be introduced at the joint trial. Some other factor must be present, such as: (1) absence of other substantial, competent evidence of the movant's guilt, e.g., *Burton* v. *State, supra;* (2) antagonistic defenses as between the co-defendant and the movant, e.g., *People* v. *Barbaro*, 395 Ill. 264, 69 N.E.(2d) 692 (1946); and (3) difficulty of segregating the evidence as between the co-defendant and the movant, e.g., *Day* v. *State*, 196 Md. 384, 76 A.(2d) 729 (1950). See generally *Annotation, 54 A.L.R.(2d)* 830, 855-862.

It is our opinion that these factors were present in the instant case. First, there was no other substantial, competent evidence of Jenkins' guilt as to the first degree murder charge; the State's evidence was limited to the two statements in this regard. Second, the defenses of Jenkins and Warner were antagonistic; to believe Warner was to disbelieve Jenkins and this made the difference, we think, between first and second degree murder in the two verdicts. Third, we are convinced that it was difficult, if not a practical impossibility, for the jurors to disassociate the evidence offered against one accused from the evidence offered against the other. However intelligent and conscientious, a juror must have had difficulty, to say the least, in removing from his mind the impression necessarily made by the statement of each of these defendants against the other. The respective verdicts make this manifest. Compare *Day* v. *State, supra.* Insofar as the degree of culpability and credibility was concerned, to try both Jenkins and Warner together was, in effect, to try each upon the extra-judicial statement of the other. Compare *State* v. *Desroche*, 47 La.Ann. 651,

17 So. 209. This is impermissible under our fundamental concepts of criminal justice, including the right of an accused to be confronted by, and to cross examine his accuser. See *People* v. *Aranda*, 47 Cal.Rptr. 353, 407 P. (2d) 265 (1965).

We are aware that the Trial Court repeatedly cautioned the jury that the statement of one co-defendant should not be used against the other. Under the circumstances before us, such cautionary instructions—like attempts to delete a name from a co-defendant's statement—do not correct substantial injustice or make an unfair trial fair. It is our opinion that admonitions to the jury, under the circumstances, neither eradicate inadmissible evidence from the minds of the jury nor obviate the possibility of the jury being misled by the statement of a co-defendant. Compare *Stallard* v. *State*, 187 Tenn. 418, 215 S.W.(2d) 807 (1948); *People* v. *Sweetin*, 325 Ill. 245, 156 N.E. 354 (1927).

For these reasons, it is the opinion of the Court that there was abuse of discretion in the denial of the motion for severance. Upon the remand, if the motion for severance is renewed, the grant or denial thereof will rest in the sound discretion of the Trial Court, to be exercised in the light of the foregoing standards and guidelines.

In *State* v. *Brinte*, 4 Penne. 551, 58 A. 258 (1904), the Court of Oyer and Terminer expressed views inconsistent with the foregoing. To the extent that is so, the *Brinte* case no longer represents the prevailing rule in this State.

The Chain of Evidence

The defendants contend that proof of the handling of articles of clothing, sent to the F.B.I. for examination, was inadequate; that, therefore, the articles were improperly admitted in evidence. We find no merit in this position.

Self Defense Instruction

The Trial Court properly declined to give an instruction self defense. We find no evidence to justify such charge.

IV.

Undoubtedly, the question of the application of *Miranda* will arise upon new trial. For the guidance of the Trial Court, we state these views:

It is our opinion that *Miranda* should not apply at new trial, notwithstanding the fact that it will be held after the June 13, 1966 effective date of *Miranda*. We think it neither logical nor reasonable that the retrial should be conducted under rules different from those prevailing when the cases were tried the first time. In *Johnson* v. *New Jersey*, —— U.S. ——, 86 S.Ct. 1772 (1966), the United States Supreme Court stated: "We hold further that Miranda applies only to cases in which the trial began after the date of our decision [June 13, 1966] * * *." Although *de novo*, a new trial is not a new case; it is a continuation of the original case until the judgment is final. In our opinion, *Johnson* refers to "cases" the original trial of which commenced after June 13, 1966. Neither *Miranda* nor *Johnson*, in our view, requires the courts of this State to make applicable upon retrial the *Miranda* rules which were not applicable at the original trial. The following statements in *Johnson* support our view:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused.
>
> "* * * [W]e do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal."

We realize that our view is the minority view in the few cases in which the question has been decided. See *State* v. *Brock*, —— Ariz. ——, 416 P.(2d) 601 (1966); *State* v. *Shaffner*, —— Wisc. ——, 143 N.W.(2d) 458 (1966); *Gibson* v. *United States* (5 Cir., 1966) 363 F.

(2d) 146. Nonetheless, we favor the minority view. See also *State* v. *Vigliano*, —— N.J. ——, 221 A.(2d) 733 (1966); *State* v. *Bradshaw*, —— R.I. ——, 221 A.(2d) 815 (1966).

V.

As to the burglary convictions: except for certain issues decided in Part III hereof, the appeals are based upon attacks on the indictment.

The defendants contend that because the State failed to notify them of the presentment of the charges to the grand jury, they were denied due process of law. This argument is built upon Superior Court Criminal Rule 6(b)(1),* it being contended that the right to challenge the grand jury prior to indictment is meaningful only if the defendant is notified in advance of the presentment of the charges to the grand jury.

The contention is without merit. The defendants were held for the Superior Court by the committing magistrate. Counsel for the defendants knew, or should have known, that the charges would be presented to the grand jury in due course soon thereafter. Counsel could have easily obtained information as to the identity of the members of the grand jury and the date of its session, if such information were desired. The State owed no duty to notify the defendants of the pendency of the grand jury proceeding; neither the Rule nor due process required it.

We have examined the cases cited by the defendants dealing with due notice of judicial and quasi-judicial proceedings as an element of due process. None dealt with grand jury proceedings; none is apposite.

Furthermore, in this connection, there was an opportunity for the defendants to challenge the grand jury or

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* Superior Court Criminal Rule 6(b)(1) provides:

"(1) Challenges. The Attorney General or a defendant who has been held to answer in the Superior Court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court."

a member thereof after indictment. Superior Court Criminal Rule 6(b)(2)* furnishes opportunity after indictment to challenge on the same grounds available under Rule 6(b)(1) before indictment. Accordingly, the defendants can complain of no final loss of opportunity to challenge by reason of lack of information prior to indictment.

The second prong of attack on the indictment is the contention that a junkyard may not be the subject of burglary under our Statute. *11 Del. C.* § 395 describes the crime of burglary in the fourth degree as the breaking and entering of a "building". The statutory definition of a "building" includes an "inclosure". *11 Del. C.* § 391(b).

The junkyard here involved was surrounded by a fence. We hold that it was an "inclosure" within the meaning of the Statute; that, therefore, the indictment is not defective as alleged.

Finally, the defendants contend that the indictment alleged that the junkyard was owned by Morris Gordon whereas the evidence showed that Delaware Compressed Steel Company was the owner. The indictment was amended to conform to the evidence by order of the Trial Court. We find no abuse of discretion in allowing the amendment that cured the variance.

It is the opinion of the Court that there was no error in the burglary convictions. They are, therefore, affirmed.

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* Superior Court Criminal Rule 6(b)(2) provides:

"(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror if not previously determined upon challenge. * * *."

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 28, 1966

THORNTON A. JENKINS,
DEFENDANT BELOW, APPELLANT

vs.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

No. 33, 1966

CLIFFORD WARNER,
DEFENDANT BELOW, APPELLANT

vs.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

(May 24, 1967)

WOLCOTT, Chief Justice; CAREY and HERRMANN, JJ., sitting.

UPON MOTION FOR REARGUMENT

HERRMANN, Justice:

We have denied motions for reargument filed by all parties herein, with this exception: the question of whether the guidelines of *Miranda* v. *Arizona*, *supra*, shall apply upon the retrial of these cases.

The parties have been able to add little to that which was before us when we reached the view of the matter hereinabove stated. We have examined the additional cases cited by the defendants: *People* v. *LaBelle*, 277 N.Y.S.(2d) 847 (1967); *People* v. *Kilduff*, 276 N.Y.S. (2d) 814 (1966); *U.S.* v. *Pinto* (D.C. N.J., 1966) 259 F.Supp. 729, aff'd —— F.(2d) ——, (1967); *Holloway* v. *State*, 32 Wisc. (2d) 559, 146 N.W.(2d) 441 (1966); *State* v. *Ruiz*, —— Haw. ——, 421 P.(2d) 305 (1966); *Creech* v. *Commonwealth*, —— Ky. ——, 412 S.W.(2d) 245 (1967). We adopt the analytical approach reflected in *People* v. *LaBelle*, *supra*, and in the dissenting opinions in *State* v. *Brock* and *State* v. *Shoffner*, *supra*.

In the final analysis, the answer to the problem lies within the four corners of *Johnson* v. *New Jersey*, *supra*. Looking to that language, the key portion relevant to this issue, it seems to us, is the following:

> "* * * Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice.
>
> "At the same time, we do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. * * *.
>
> "In the light of these additional considerations, we conclude that *Escobedo* and *Miranda* shall apply only to cases commenced after those decisions were announced. * * *."

In view of the foregoing statements, we remain of the opinion that *Johnson* does not require the Courts of this State to make applicable upon retrial *Miranda* guidelines which were not applicable upon the original trial. In the light thereof, we retain the view that *Johnson* does not require us to change the governing rules so drastically, midway between the first trial and the retrial of the same case.

We adhere to the ruling that, upon retrial of the instant cases, the guidelines of *Miranda* shall not apply.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TRANSCRIPT OF TRIAL—October 2, 1967

[EXCERPTS FROM THE TESTIMONY OF SGT. EUGENE MALONEY]

[fol. 57] Q And where did you see it on that occasion?

A It was parked approximtely in front of 621 East 5th Street.

Q And approximately what time of the day did you see this Pontiac at that location?

A Approximately, I would say, 9:45 in the morning is when I first seen it.

Q Did you have occasion to see Thornton Jenkins on the morning of the 17th?

A Yes, sir, I did.

Q Where?

A I first observed him at 617 East 5th in the rear yard.

Q What was the occasion of you being at 617 East 5th on the morning of the 17th?

A Primarily we went there to see if Thornton Jenkins and Clifford Warner were at that location.

Q And upon arriving there what did you observe?

A When we first arrived there we knocked on the door. The door was shut. A lady answered the door, one Leona Marshall. I asked her if she was the lady of the house and she stated that she was. I told her that I would like to speak with Thornton Jenkins if he was there. She informed us that—

MR. HERNDON: Objection.

* * * *

[fol. 60] BY MR. CONNER:

Q Sergeant, what was the purpose of your next conversation with Leona Marshall?

A Since these persons had been picked up at her home and being that I had once again observed the Pontiac sitting approximately one door down from her home I requested of Miss Marshall if she would give me permission to search her house.

Q And what was the result of this request?

A After I requested this I also informed her that we were investigating a complaint of murder. She stated that she had nothing to hide, that I could search her house as she knew I could get a search warrant if I wanted to.

Q Did you make any threats in order to secure this permission to search?

A No, sir, I did not.

Q Did you promise her anything?

A No, sir.

Q Where did this conversation take place?

A This took place in the Detective Division.

Q And after this conversation what did you do next?

A The lieutenant had summonsed Sergeant Gregg from his home. Sergeant Gregg came in with me. Miss Marshall accompanied us down to her house. She was [fol. 61] once again advised in front of her house that it was not necessary for her to allow us to make this search if she did not want to, told her the fact that we did not have a warrant. She once again stated that she had nothing to hide, that we could search her house.

Q And then you proceeded to search?

A At this particular time she started looking for the key. She couldn't actually find the key and a short while later she did find the key. She was going to go to Central and try to get a key off Thornton Jenkins.

Q Whom did you understand to be in possession of the premises at this time?

MR. HERNDON: Objection. I think that's totally irrelevant, whom he thought had possession.

MR. CONNER: All right. Your witness.

CROSS-EXAMINATION

BY MR. HERNDON:

Q Sergeant Maloney, when you first arrived at 617 East 5th Street and you knocked on the door and Miss Marshall answered, how was she dressed at that time?

A I believe at that particular time she had on some sort of housecoat or robe, no negligee. It would have been along the line of a robe.

Q Like a housecoat or something?

[fol. 62] A More or less a housecoat or robe.

Q Did she seem surprised when you knocked at the door?

A Not particularly, I don't think so.

Q Earlier you mentioned having seen Thornton Jenkins in this 1955 Pontiac on January 30-31st.

Q Had you known him for some time?

A Yes, sir.

Q Did you know where he lived at that time? Were you familiar with about where he lived?

A I believe I could answer that by saying I know several places where he did live.

Q Did you know he was living with Miss Marshall? Were you familiar of that fact?

A No, sir, not at that time.

Q To go back then to the morning of the 17th, how many people were in this house other than this Marshall, Jenkins and Warner?

A There was actually four other persons.

Q And who were they?

A There was Amos Jenkins, Monroe Townsend, Shirley Mundy, and I believe there was a John Jones or there was a man by the name of Jones.

Q When you went in there and as soon as you had [fol. 63] them all collected, did you or any other member of the group of officers present frisk any of these persons, more particularly the defendant?

A Thornton Jenkins, as I say, was out in the back yard. I went out in the back yard after him. There is a good possibility that I did frisk him.

Q Did you frisk any of the others inside the house?

A I personally didn't.

Q Did any of the other officers frisk those present in the house?

A That I couldn't say.

Q Well, is that your standard procedure, to do that?

A It would be when you are taking them in, it would be the normal procedure for somebody to pat them down.

Q You mentioned that you asked them to come along to the police station with you. Did they have a choice as to whether or not they would come?

A No one at that time had made any objection.

Q Will you just answer that question yes or no.

A Would you repeat the question, please?

Q Did any of those present have any choice as to whether or not he would go along with you to the police station?

A I think originally they would have had a choice.

[fol. 64] Q If any of them would have said "No," would you have required them to go with you?

MR. CONNER: Your Honor, this is a hypothetical question not based on anything factual.

MR. HERNDON: Well, your Honor, this is nothing new. We are going through a rather polite recitation of what happened and I dare say it wasn't at all that polite and I am just trying to get a better picture of what was going on.

THE COURT: All right. I will overrule the objection.

BY MR. HERNDON:

Q Did these people have any choice as to whether or not they would accompany you to the police station?

A Well, I will tell you that when I originally requested it there was no objection, so at that particular time nothing else entered my mind except the fact they were going with me.

Q Did you tell Miss Marshall to get dressed?

A Since we were going to the police station and, as

I said, she was dressed in some type of a robe, I more than likely did tell her to go get some clothing on.

Q Did you tell her you were going downtown or words to that effect?

A No, sir.

Q Did you tell them why they were going with you?

[fol. 65] A No, sir.

Q You just said "Come along," right?

A Yes. I requested they go with me to the Detective Division.

Q How many uniformed officers were with you at the time?

A Three.

Q Were there any other officers in plain clothes?

A Sergeant Mackey was in plain clothes. Actually there were five officers, three in uniform and two in plain clothes.

Q Now, after you arrived at the Detective Division, before you go in there is a long bench or at least there used to be one outside the door going into the Detective Division. Where did you put the various people who went down with you?

A Some of them were actually out there seated on that particular bench, and I believe some of them were actually in the interior.

Q Who was in the interior?

A A short while after we were at the Detective Division Miss Marshall was on the interior. I was talking with her.

Q Where was Thornton Jenkins?

A I couldn't say at that particular time. I believe he was in a small—what we call a recording room.

Q Right near where Miss Marshall was?

[fol. 66] A No. It's in the same confine but actually he is in a small room and we are in the Detective Division, the main area.

Q Did you ask Thornton Jenkins for his permission to search the property?

A No, sir, I did not.

Q You knew he lived there though, did you not?

A I had understood that he was living there with Miss Marshall.

Q You knew this for a fact?

A According to Miss Marshall, she stated that Thornton Jenkins was her man.

Q And what did that connote to you?

A That since he was her man that they both were probably living together as common-law man and wife.

Q Do you recall what your exact words were to Miss Marshall when you initially asked her for permission to search the house?

A I had mentioned the 1955 Pontiac down there, also the fact that we were investigating a murder, that I did wish to search her house. However, I said, that she did not have to let me search the house. With this she stated that she had nothing to hide and she knew I could get a search warrant anyway.

Q When you asked Miss Marshall for permission to [fol. 67] search the house what time was this? This is the first time.

A I would say it would be in the neighborhood of, say, 10:45 to 11 o'clock.

Q Had anybody at that time been charged with murder?

A Not at that time.

Q As far as you were aware was the defendant Thorton Jenkins going to be charged with murder?

A I couldn't actually answer that.

Q Let me put it this way: You had gone down to this property to pick up Jenkins and Warner, had you not?

A Yes, sir.

Q And you told Miss Marshall that you were investigating a homicide, did you not?

A Yes, sir, that I was from the Detective Division.

Q Now, it is upon that occasion that I am asking you was not Thornton Jenkins one of those you proposed to charge with this homicide?

A He would have been considered a prime suspect.

Q He was a number one, is that right? I mean he was the boy you were after at that time, was he not?

A Not necessarily so. Clifford Warner was taken in too at that time.

Q But they were the number one suspects?

[fol. 68] A I am not—

Q Let's not play games.

A I am not attempting to play games but I will answer the question.

MR. CONNER: He answered the question, your Honor. He said they were prime suspects, and I don't see what the difference is in whether you call them prime or number one suspects.

THE COURT: All right.

BY MR. HERNDON:

Q Did you consider asking Mr. Jenkins for permission to search the house?

A No, sir, I did not.

Q Was anybody with you—well, excuse me. The second time you asked for permission I think you said it was down at the house or in the vicinity?

A Yes, sir.

Q Was anyone with you on that occasion?

A Sergeant Harvey Gregg.

Q And did you ask her for your permission while you were in your car or outside, or where were you when you asked for her permission the second time?

A She was asked permission directly outside her home and I believe we asked her as we were going down in the car.

[fol. 69] Q So it was three times then, according to your recollection?

A Yes. But when I say going down in the car I can't say definitely, but I believe I did inform her once again. But I definitely informed her in front of her house.

Q And you told her the same thing on at least the two occasions and maybe three?

A Primarily, yes, sir.

Q In your advice to Miss Marshall regarding the fact that she could require you to get a search warrant, what exactly did you tell her in that regard if you remember?

A She was actually the one that made that statement, that she knew if I wanted to I could get a search warrant.

MR. HERNDON: I have no further questions.

MR. CONNER: No further questions of this officer on this voir dire.

THE COURT: You may step down.

[EXCERPTS FROM THE TESTIMONY OF LEONA MARSHALL]

[fol. 73] LEONA MARSHALL

LEONA MARSHALL, called as a witness on the part and behalf of the Defendant, on voir dire, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HERNDON:

Q Miss Marshall, would you please state your full name and your present address, where you live now?

A Leona Marshall, 700½ East 6th Street.

Q Miss Marshall, where did you live on March 17th, 1965?

A 617 East 5th.

Q And how long had you lived at that address, approximately at that time? How long have you lived there?

A About three years.

Q And had Thornton Jenkins lived there with you that entire time?

A Right.

Q What was your relationship with Thornton Jenkins?

A Well, I believe he was my—I believe you would call it common-law husband.

[fol. 74] Q How long had you had that relationship with him in 1965?

A Well, he was living with me there until he got locked up.

Q And that had been going on for how many years? You said you lived at that address at 617 East 5th for three years, but had you lived together as man and wife before then?

A We had been going together when I lived on 7th Street.

Q So you had been living together as common-law man and wife for a number of years, is that correct?

A I would say about four years.

Q Coming back to this morning when you say Thornton Jenkins got locked up, do you recall the arrival of the police officers at your house that morning?

A It was around about 8:30, or something to 9:00. I don't know the exact time.

Q What happened?

A Well, I was in bed and there was a knock on the door.

Q What kind of a knock was it, a loud knock?

A Yes, a loud knock.

Q Did anyone say anything when they knocked?

A No.

Q Just a knock?

A Yes, and I put my housecoat on.

[fol. 75] Q What happened? Did you open the door?

A Yes.

Q Who was there?

A A couple of detectives.

Q Was this officer standing in the back of the room, Sergeant Maloney, one of them?

A He was one of them.

Q Did he say anything to you?

A He said he was a police officer or detective or something like that.

Q Did he say what he wanted?

A If I recall I think he asked me was Thornton home, I think. As I recall I think that's what he said.

Q Was Thornton home?

A Yes.

Q Did you have any discussions about going to the police station?

A We all went in the dining room, Thornton, Clifford, Shirley, and another fellow, Johnny Jones was sitting, like, in the dining room, and he walked in and I recall he told one of them to stand against the wall, something like that. So he said "Leona, get dressed, we are going downtown," and I said "What for?" And he said "We are all going downtown."

[fol. 76] Q Were you a little frightened?

A Yes, because I didn't know what was going on. I knew I hadn't did anything.

Q Did you see them frisk Thornton and Clifford?

A They leaned them against the wall, yes.

Q And what happened when you got downtown? Where did you go?

A We went to the Detective Bureau and as we were sitting out in the hallway he took Thornton and Clifford, Thornton to one room and Clifford to another.

Q Later on did you have any discussion with Sergeant Maloney about searching the house down on 5th Street?

A Yes. He asked me and I told him to go ahead in.

Q Did you know that you didn't have to let him search that house if you didn't want him to?

A I didn't know it at the time. To tell you the truth I didn't know exactly what to do.

Q Why? Were you frightened?

A Well, I mean they still hadn't told us what it was all about, so I just told them to go ahead in and search it.

Q Did anybody talk to you about the fact that they were investigating a homicide, a murder?

A Not until later on.

[fol. 77] Q When was that?

A Right after we came back the second time.

Q After you came back from going to the house?

A Detective Purnell was the one who told us about it.

Q Detective Purnell?

A Yes.

Q But no one had told you about it before you went down there, is that right?

A No.

Q Are you sure about that?

A I am positive, yes.

Q Now, you said you didn't know what was going on and you didn't know and didn't have to let them search the property. Did you think they could search it if they just wanted to?

A Yes.

Q Pardon me?

A Yes.

Q In other words, you figured you didn't have any choice about whether or not they searched—

MR. CONNER: Objection as a leading question.

THE COURT: Objection sustained.

BY MR. HERNDON:

Q Did you feel that you had any choice as to whether [fol. 78] or not they would search the property?

A Well, I mean at the time I wasn't—I didn't think about it too much one way or the other.

Q Now, I take it you then went down to the house, is that right?

A Right.

Q And who went down there with you?

A Another officer.

Q Do you mean Sergeant Maloney?

A Yes.

Q And another officer?

A Right.

Q Did you have any discussions about searching the house on the way down in the car?

A No.

Q Did you have any discussions about searching the house after you got down there?

A Well, I just opened the door.

Q You just opened the door?

A Yes.

Q Did anyone say anything to you about giving your permission to search the house at that time? Once you got down to the house did either of the police officers ask [fol. 79] for permission to search the house again?

A I really don't know.

Q You just don't know or they didn't?

A I don't know. I was all confused. I don't remember exactly what happened.

Q Was Thornton Jenkins working prior to the time that he was arrested down there?

A I think he worked up that Saturday, but he didn't —I don't know if he went to work that Monday.

Q Where did he work on the prior Saturday?

A Joseph Crisconi.

Q The garbage man?

A Yes.

Q How long had he been working for Crisconi, roughly?

A Oh, about—I think when we first started to go together he was working there, because when we lived on 7th Street he was working there.

Q So he had been working for Crisconi for a number of years?

A Yes.

Q Did he pay the rent money for this house?

A Yes, he paid it. I had one roomer there.

Q What did you say about a roomer?

[fol. 80] A I had one roomer, Monroe Townsend.

Q He was a roomer and he paid you for his room?

A Yes.

Q But Thornton paid the rent, is that right?

A Yes.

Q How about the deposit on the rental of that property, where did the money from that come from? Was that provided by Thornton?

A Yes.

Q Who took that deposit up to the landlord?

A Thornton did.

Q You didn't take it?

A No.

Q You are sure of that?
A I am positive.
Q Who made the arrangements for renting the house the first time?
A He went up there and rented it.
Q Did you telephone up there or anything?
A Yes, I telephoned Mr. Weiner because I had a burned foot at the time and I couldn't get around too good.
Q So you called over there on the telephone?
A Yes.
[fol. 81] Q Who did you call?
A Well, his secretary.
Q Whose name did you give, your name or Jenkins?
A I gave my name.
Q And the deposit, though, that went up on the property was with money Jenkins had provided you with, is that right?
A Yes.
Q And as far as you recall he took it up there himself?
A I knows that.
Q And you didn't?
A He took it up there.
Q And you know that all the rentals were paid by him, is that right, except from Townsend, what he contributed?
A That's right.
MR. HERNDON: Thank you, Miss Marshall.

CROSS-EXAMINATION

BY MR. CONNER:

Q Mrs. Marshall, whose name, if you know, did Mr. Weiner have on the book, yours or Jenkins?
A Mine, because I have the rent book home now.
Q You still have the rent book at home?
A Yes.
Q And your name is on it?

[fol. 82] A That's right.

Q And Jenkins' name was not on it?

A His name was not.

Q How did you pay, by the week or month?

A I pay it by the month.

Q Who would take the money up there and give it to Mr. Weiner?

A I would take it up sometimes, my son would, because he would be working, I would be working. So sometimes I give it to my son, he takes it up.

Q Did Jenkins ever take it up?

A Yes, indeed. He is the one who took the deposit up there of $50.

Q You are sure of that?

A I am positive.

Q Are you aware that Mr. Weiner on a prior occasion told us that he had never seen Jenkins or heard of him?

A He is wrong because he has met him. Mr. Weiner loaned Jenkins $10 about a week before he got locked up, because he asked me to pay it and I didn't want to pay it.

Q Now, on this morning when the police came to your house—do you remember that?

A Yes.

* * * *

[EXCERPTS FROM THE TESTIMONY OF SGT. JOHN T. OGDEN]

[fol. 96] Now, as a part of this investigation did you have occasion to interview Thornton Jenkins?

A I did.

Q When did you interview Thornton Jenkins for the first time?

A 11:30 a.m. on that morning of March 17th, 1965.

Q Where at?

A In the Detective Division.

Q In whose presence?

A Just he and I were alone in the room, the interrogation room.

Q Prior to this interview what if any advice did you give to Thornton Jenkins?

A I identified myself as being a policeman, identified myself as Sergeant Ogden, told him he had a right to an attorney if he wanted one and that he didn't have to say anything unless he wanted to, that anything he might say might be used in a court of law for or against him.

Q What was his reaction to this advice?

A He said he didn't want an attorney.

Q All right. Did you make any threats to him at that time?

A No, I didn't.

[fol. 97] Q Did you make any promises to induce this interview?

A No, I didn't.

Q Did you then proceed with the interview?

A I told him I wanted to know about his activity prior to having been picked up the night before.

Q And his reply was what?

A He told me the direction of travel that he had made from the house where he had lived to the time he was picked up.

Q Could you tell us what he told you?

A I can if you will permit me to use some notes that I took of it.

Q Did you take the notes?

A Yes, sir.

MR. HERNDON: As long as I have the opportunity to see them too, your Honor, it's all right.

MR. CONNER: We have no objection to him seeing them.

THE COURT: Perhaps Mr. Herndon would like to see the notes now before he testifies.

THE WITNESS: I will get the page in question. Here we are.

THE COURT: You may ask him whatever questions you wish, Mr. Herndon.

MR. HERNDON: I think he can examine the Ser-

[fol. 98] geant and then I will have my turn.

THE COURT: All right.

BY MR. CONNER:

Q Will you tell us what that interview consisted of?

A The direction of travel prior to 10:00 p.m. on the preceding night, which would have been March 16, 1965, and Thornton related that he had been at 617 East 5th Street which was his house and he said—you want me to use other people's names?

Q Yes, you can use them for this purpose.

THE COURT: All right.

A "Me and Cliff went to Klund and Pine, looked inside George's Cafe, and went down Pine Street to 4th, up 4th to Walnut, down Walnut to Front, out Front to Market, walked south on Market Street on the east side of the street, crossed over by Tirem- ters."

Q All right. Was anything else said at that interview?

A No, that was it at this interview, which was at 11:30 in the morning.

Q Did you have occasion to interview him again that day?

A Yes, I did, at 2:50 p.m.

Q Prior to that interview did you advise him of anything?

A Yes, I advised him that he was under arrest at that [fol. 99] time, at 2:50 p.m., that he was under arrest on the charge of murder, and at this point I was in the presence of Sergeant Maloney and Sergeant Lingle.

MR. HERNDON: May the record show the Sergeant is referring to his notes.

THE COURT: The record will so show.

THE WITNESS: I read a statement to him. I don't know whether you want that.

BY MR. CONNER:

Q You read a statement to him. Whose statement was that?

A Clifford Warner's statement.

Q Did you have any reaction to the reading of this statement?

A This is what I wrote down what his answers were to the statement, his remarks after the statement was read.

Q What were his remarks after the statement was read?

A That he told the truth about riding and getting out of a car, that "We both were in the junk yard, me and Clifford," and that Clifford went in first. He also denied having any knife in his belt, and that's the extent of my notes of that interview at 2:50 p.m.

Q Did you reduce that to a written statement at that time?

A Not at that time, no.

[fol. 100] Q Did you have another interview that day?

A Yes, I did.

Q That interview was when?

A 7:05 p.m.

Q In whose presence?

A In the presence of Sergeant Lingle.

Q Was this the occasion when there was a statement reduced to writing?

A Shortly after 7:05 I interviewed him. Incidentally the statement signed by him was taken at 7:15 p.m.

Q Prior to this what if any advice did you give him?

A He was advised as to his rights to remain silent or his right to have an attorney, and I am trying to remember whether he called for us to talk to him or not. I am not certain at this point. However, at 7:05 I had occasion to talk to Thornton again after he had talked to his brother, Amos. I have this written down here and this is the gist of what he told me:

"Clifford went in by the fence first. I went in second. We went around and put the stuff by the fence and loaded it into the car and all four of us went back to the house. Monroe went into the house, then unlocked the cellar window. Clifford wanted to go back again. At this point Clifford went into the yard and I went in second. [fol. 101] I heard telephone ringing and as we turned tussled with another fellow who was there. I got hit on the upper right forearm up by the crane."

Now, that's the extent of what was said at 7:05 prior to that 7:15 statement.

Q Now, let me interrupt you. At any time that day, at 11 o'clock or at 2 o'clock or at 7 o'clock, did you or anyone in your presence make any threats to Thornton Jenkins to induce a statement either orrally or written?

A Positively not.

Q Did you make any promises to him that he could benefit in any way if he gave a statement?

A Positively not.

Q Did anyone in your presence make any such promises?

A No, sir.

Q I hand you a piece of paper and ask you can you identify that?

A That is a copy of the original statement that I typed up and was taken from Thornton Jenkins in the presence of Sergeant Lingle who asked the questions.

* * * *

[fol. 110] CROSS-EXAMINATION

BY MR. HERNDON:

Q Sergeant, I believe that you said that there were three occasions on which you interrogated Thornton Jenkins during the date of March 17, 1965, is that correct?

A Correct.

Q Around 11:30 in the morning, 2:50 in the afternoon and 7:05 in the evening?

A That's correct.

Q Now, on any of these three occasions did you advise the defendant of his right to have counsel supplied to him if he was unable to afford counsel of his own?

A No, I didn't.

Q And at this time, of course, you were aware of the fact that the Public Defender's Office was in existence?

A I was not. I don't know what date they went into effect. Do you know what date that was?

Q I believe it was 1964. Now, prior to this first meeting you had with Thornton Jenkins at approximately 11:30 in the morning, what was the first thing you did [fol. 111] when you encountered him, when you first talked to him?

A To pull out my badge and identify myself as Sergeant Ogden.

Q And then what did you do, what did you say to him?

A I told him I wanted to talk to him about the incident that happened the time before. He mentioned the fact that he was under arrest on a night prowling charge.

Q Did you just refer to the night prowling at that time?

A At that time, yes, that's right.

Q At that time, however, you knew that a homicide had occurred?

A I knew that we found the body down at the crane at that time.

Q What specifically by way of a warning did you give him prior to the time you started questioning him or talking to him?

A I told him at the time that he had certain rights, those rights being that he had a right not to tell me anything, not to talk to me, and anything he did say to me could be used either for or against him in a court of law, and that he had the right to an attorney. That's about the extent that I advised him at that time.

Q It was the same warning that you gave him on each of the three occasions to which we made prior reference, [fol. 112] is that correct?

A Yes, sir.

Q Now, moving on to the second interrogation of the defendant Jenkins at 2:50 in the afternoon, on that occasion did you apprise him that he had been charged with murder?

A Yes.

Q You told him specifically?

A Right.

Q Now, on that occasion was anyone else in the room with you?

A Yes.

Q Who was with you?,

A Sergeant Lingle and Sergeant—I believe it was Maloney—just a second, I wrote it down here. 2:50 p.m., in the presence of Sergeant Maloney and Sergeant Lingle.

Q All right. Now, let's move on, if you will, to the third occasion when you interrogated Jenkins. That was in the evening at 7:05 o'clock?

A Yes, sir.

Q And I believe that you recited some information that you got from him before the written statement was taken. Prior to obtaining that information did you or did you not give a warning to the defendant, do you remember?

[fol. 113] A I said I believe that he asked to see us. I am not positive of this. I think the transcript will probably tell you more accurately. However, I believe right now that he called to the detectives after he talked to his brother. He was therefore brought from the cell downstairs up to the interrogation room where I recited to him as I said that he had certain rights.

Q Do you recall specifically giving these warnings before he gave you this information contained in your notes?

A I gave him these specific warnings prior to each interrogation.

Q In other words, then your position is or your testimony is that you gave this warning to which you referred three times?

A At least three times.

Q Plus the warning which was contained in the headnote of the statement, is that right?

A That's right. That would make it four times.

Q Well, on any of these occasions did you advise him that he had a right to an attorney from the Public Defender's Office if he was unable to afford an attorney?

A We did not do so on that date. That was not in it yet.

Q At the time you started to take another statement at 7:15 in the evening, what was your purpose on this occasion?

A I believe as I testified to he asked to see us. He [fol. 114] wanted to give us a statement.

Q Isn't it a fact at this time that you had the defendant pegged to be at least one of the principals in this homicide?

A He was arrested for it, that's right.

Q And the purpose of this statement was to confirm your conclusion, is that correct?

A As I testified to, he asked to see us to give us a statement, as I recall. The statement speaks for itself.

Q But your purpose in taking the statement was to verify the conclusion you already had reached that this was the man who was guilty of the homicide, is that not correct?

A If I hadn't of thought he was the man I wouldn't have charged him with the offense.

Q So then the answer is yes?

A Yes.

Q May I borrow your notes again, please.

A Sure.

Q Sergeant, do you recall having testified at a preliminary hearing in April of 1965 in this same matter?

A I testified several times in this case, and if you say it was in April of 1965 it's entirely possible that is when it was.

Q To put it this way I will ask you, do you recall [fol. 115] having testified in a preliminary hearing?

A Municipal Court, yes.

Q In the Municipal Court. Do you recall having testified regarding this very statement about which we are concerned now?

A I haven't had an opportunity to look at that transcript, so whatever it says is what I said. I don't recall exactly. I am testifying to the best of my recollection and that's the best I can do.

MR. HERNDON: Your Honor, this is somewhat lengthy, but if Mr. Conner would like to we can stipulate

that the testimony that Sergeant Ogden gave on this point at the prior trial can be considered by the Court, rather than go through it all again.

MR. CONNER: Yes, the State will so stipulate.

THE COURT: All right.

MR. HERNDON: I will ask the Court to consider pages 310 through 314 of the prior trial of Jenkins.

BY MR. HERNDON:

Q Now, referring once again to your notes, Sergeant Ogden, is there anything in those notes that indicate to you that you gave any warning to the defendant prior to taking this information from him at 7:05 in the evening of March 17th?

A Not a thing in the notes to indicate that, that's right.

Q In other words, it's just your recollection at this [fol. 116] time?

A It is more or less what the defendant told me that I wrote down, not what I said.

Q So what we have then is your recollection at this time?

A That's right.

MR. HERNDON: That is all.

MR. CONNER: That's all.

THE COURT: Mr. Conner, do you have another witness you want to put on regarding the statement?

MR. CONNER: I hadn't planned to call another witness. I didn't at the last trial, and I think it isn't necessary unless Sergeant Ogden's credibility is in doubt.

THE COURT: Then you may proceed, Mr. Herndon.

MR. HERNDON: All right. I will call the defendant Thornton Jenkins.

[fol. 123] MR. HERNDON: Your Honor, the only other point we make at this time for the record is regarding what the docket slips of the Department of Public Safety show, and I think Mr. Conner and I have agreed to stipulate that, and this will eliminate bringing somebody in to testify that the defendant, Thornton Jenkins, was apprehended at some time between 9:30 and 10 o'clock in the morning of March 17, 1965, that he was charged with night prowling at 11:00 a.m. on that morning, with burglary in the fourth degree at 1:15 in the afternoon, and murder in the first degree at 1:15 in the afternoon, and that the written statement was taken subsequent to 7:00 p.m. that same day.

THE COURT: Do you so stipulate?

MR. CONNER: Yes, sir.

[fol. 125] MR. HERNDON: Rather than duplicate my argument, your Honor, I will cover both the search and seizure and the statement. Obviously the Supreme Court has already ruled on both of these points, and our position with respect to the search and seizure is that one can only knowingly waive a right which they know they have, but that if you don't know you have it you can't waive it, and Mrs. Marshall testified she didn't know she had such a right so that therefore she couldn't waive it. However, it is our position that nobody but the defendant can validly consent to this search, more particularly so when the purpose of the search was to obtain evidence against him specifically. He was one of the two primary suspects, he was available to give a consent, but no effort was made whatsoever to obtain consent from him.

Now, turning to the statement there is, of course, a [fol. 126] factual dispute as to whether or not the appropriate warnings were given. Sergeant Ogden did testify here that prior to taking the information which he did from the defendant at 7:05 which was subsequently incorporated in the written instrument he gave all these various warnings which were referred to in the headnote of that statement. It is our position that his recollection here is just simply faulty, that it was more accurate about a month after this incident when he testified in the Mu-

nicipal Court, and the testimony is in those pages of the transcript to which we referred, when he testified he didn't give that warning and we submit that if he didn't give that warning the statement is inadmissible.

Now, moving on, assuming your Honor finds that these warnings were given and the statement was in this context voluntary by the old pre-Miranda standards, then we come to the point of how we read Johnson versus New Jersey. Although it has been said that applying it to the prevailing situation the Miranda standards are inapplicable, of course we take the contrary view.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 125, 1967

THORNTON A. JENKINS,
DEFENDANT BELOW, APPELLANT

vs.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

(March 8, 1968)

WOLCOTT, Chief Justice; CAREY and HERRMANN, JJ., sitting.

Upon appeal from Superior Court. Affirmed.

Henry N. Herndon, Jr. of Morris, James, Hitchens & Williams, Wilmington, for defendant below, appellant.

Jay H. Conner, Deputy Attorney General, Wilmington, for plaintiff below, appellee.

HERRMANN, Justice:

This is the defendant's second appeal from a conviction of murder. Upon a conviction of murder in the first degree, and the sentence of death imposed thereon, the defendant successfully appealed and obtained a new trial. See *Jenkins* v. *State*, —— Del. ——, 230 A.(2d) 262 (1967), to which reference is especially made for the factual background of this case. Upon retrial, the defendant was convicted of murder in the second degree and sentenced to life imprisonment. The present appeal is from that conviction.

This appeal is based upon three grounds:

I.

First, the defendant contends that submission to the jury of the felony-second degree murder issue was preju-

dicial error because (1) founded, as it was, upon a burglary of which the defendant had been previously convicted, it subjected the defendant to double jeopardy; (2) the burglary did not involve circumstances foreseeably dangerous to human life; and (3) the jury charge * in connection with felony-murder referred to an "attempted burglary", which is a misdemeanor and not a felony.

There is an overall answer to these contentions which, in our opinion, renders any error in connection therewith harmless beyond a reasonable doubt: ** During its deliberations, the jury asked for clarification of the instructions. In response, with the consent of the defendant's attorney, the Trial Court put the following two questions to the jury for special verdict,*** to supplement the general verdict:

"Do you imply malice from the severity of the fatal attack and beating?

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* The jury charge in this connection was as follows:

"* * * if after a careful and conscientious consideration of the evidence in this case you are satisfied beyond a reasonable doubt that the accused killed the deceased or participated in the killing of the deceased under the circumstances showing no justification, mitigation or excuse, but that he killed him or participated somehow in the killing unlawfully and cruelly without adequate provocation, that is, with implied malice, your verdict should be guilty of murder in the second degree.

"In the alternative, and after a careful and conscientious consideration of the evidence, you should be satisfied beyond a reasonable doubt that the defendant himself or with another killed the deceased proximately as the result of the perpetration or attempted perpetration of burglary in the fourth degree, and that under the circumstances of this case the alleged burglary or attempted burglary was foreseeably dangerous to human life, your verdict should also be guilty of murder in the second degree.

"I instruct you that you may return a verdict of murder in the second degree under either or both alternatives and I direct you to consider both alternatives in arriving at your decision."

** Compare *U.S.* v. *Chapman*, 386 U.S. 18, 87 S.Ct. 824 (1967).

*** It is unnecessary, in this case, for us to approve or disapprove the special verdict procedure here adopted. But see Rule 31 of Superior Court Criminal Rules and of Federal Rules of Criminal Procedure; *U.S.* v. *Ogull* (D.C. N.Y.) 149 F.Supp. 272 (1957).

> "Do you imply malice as a result of the conclusion that the decedent was killed during and as a result of the perpetration or attempted perpetration of the burglary in the fourth degree under circumstances in which it was reasonably foreseeable that it was dangerous to human life?"

The jury answered both questions in the affirmative. We conclude therefrom that the general verdict of "guilty as charged" and the judgment of conviction must stand, on the basis of the affirmative answer to the first question alone. As a result of that conclusion, any of the asserted errors, relative to the felony-murder aspect of the case, must be deemed not sufficiently prejudicial to constitute reversible error.

Nonetheless, for the enhancement of our discussion of the felony-murder rule in *Jenkins* v. *State*, *supra*, we make brief comment as to the specific errors here asserted.

1) There is no merit in the double jeopardy argument. The felony-murder basis of prosecution for murder may not be ruled out of a case by the fact that the felony component of the doctrine was the subject of an earlier prosecution and conviction * limited to the specific felony involved.

In the instant case, the defendant was charged, tried, and convicted for murder—not burglary.** Burglary is not a lesser offense included in the greater crime of murder, as the defendant argues. Wholly inapposite are the authorities cited by the defendant regarding the double jeopardy bar of a lesser-included offense in a subsequent prosecution for a greater crime.

2) The question of whether the burglary involved circumstances foreseeably dangerous to human life was properly left to the jury. There was sufficient evidence to warrant making this a jury question, and the Trial Court was correct in so doing. See 230 A.(2d) 262, 269.

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* It is assumed that, as in the instant case, the fact of the earlier conviction of the felony was not communicated to the jury in the murder case.

** The burglary conviction was included in the earlier appeal, and was affirmed. See 230 A.(2d) 262, 274-275.

3) It was not error, as the defendant claims, to refer in the jury charge to the "attempted perpetration" of the burglary, and the "attempted burglary", as a possible basis for the operation of the felony-murder rule. In *Jenkins*, we stated that the felony-second degree murder rule shall apply to "homicides proximately caused by the perpetration or attempted perpetration of felonies which are, by nature or circumstances, foreseeably dangerous to human life." The Trial Judge adopted this language in the charge. That the felony-murder rule is applicable to the attempted perpetration of the felony, as well as to the actual perpetration, is beyond question. E.g., 2 *Burdick, Law of Crime*, § 454, p. 176; 1 *Wharton's Criminal Law and Procedure*, § 251, p. 541. It is the felonious design imputed from the felony to the homicide that constitutes murder under the rule; and that felonious intention is deemed to have existed, and is thus imputed, whether the felony was actually perpetrated, or was halted at the "attempt" stage. 26 *Am.Jur.* "Homicide" §§ 188, 192. Therefore, although an attempt to commit a felony is a common law misdemeanor (1 *Burdick, Law of Crime*, Ch. X), a homicide proximately caused by the attempted perpetration of a felony, which is by nature or circumstances foreseeably dangerous to human life, falls nevertheless within the felony-second degree murder rule. There was no error, therefore, in the jury charge in this respect.

II.

For record purposes, the defendant renews his contention that the rules of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) were applicable to the retrial.

We held against that contention in our earlier decision (230 A.2d 262, 274, 275-276). Since then, the same conclusion has been reached by the Supreme Court of New Jersey in *State* v. *Vigliani*, 50 N.J. 51, 232 A.(2d) 129 (1967), and by the Maryland Court of Special Appeals in *Boone* v. *State*, —— Md. ——, —— A.(2d) —— (1968), among others. We adhere to our earlier ruling on this point.

III.

Also, for record purposes, the defendant renews his contention that the search and seizure in this case violated his constitutional rights. We adhere to our earlier rulings on this point. See 230 A.(2d) 262, 269-271.

* * * *

Accordingly, the judgment below is affirmed.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 125, 1967

THORNTON A. JENKINS,
DEFENDANT BELOW, APPELLANT

v.

THE STATE OF DELAWARE,
PLAINTIFF BELOW, APPELLEE

FINAL JUDGMENT

This 12th day of March, 1968, the opinion of this Court on the appeal of Thornton A. Jenkins having been rendered on March 8, 1968, for the reasons stated therein, it is

ORDERED:

1. The judgment of the Superior Court in and for New Castle County be and it is hereby affirmed.
2. The issuance of the mandate and remand of these proceedings to the Superior Court be and they are hereby stayed until ten (10) days after the determination of the Supreme Court of the United States upon the appellant's application for review of this cause by the Supreme Court of the United States.

/s/ D. L. HERRMANN
J.

No Objection:

Attorney General of the State of Delaware

By: /s/ JAY H. CONNER
Deputy Attorney General

SUPREME COURT OF THE UNITED STATES

No. 195 Misc., October Term, 1968

THORNTON A. JENKINS, PETITIONER

v.

DELAWARE

On petition for writ of Certiorari to the Supreme Court of the State of Delaware.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 748 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 18, 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 329473 389

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 748

THORNTON A. JENKINS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 748

THORNTON A. JENKINS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE PETITIONER

Opinions Below

The opinions of the Supreme Court of the State of Delaware (A 52 and A 98) are reported at 230 A. 2d 262 and 240 A. 2d 146.

Jurisdiction

The final judgment of the Supreme Court of the State of Delaware was dated March 12, 1968 and was entered on March 14, 1968 (A). The Petition for a Writ of Cer-

tiorari was filed on May 3, 1968, and was granted on November 18, 1968. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment, Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are set forth in Appendix A.

Questions Presented

I. Whether *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) requires that the retrial of a defendant commenced after June 13, 1966 be conducted in conformity with the standards specified in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

II. Whether a warrantless search of a suspect's residence based solely upon the consent of a joint occupant is barred by the Fourth and Fourteenth Amendments, where the suspect was in custody and immediately available to give or withhold his consent and where the specific purpose of the search was to obtain evidence to be used against him.

Statement of the Case

The Petitioner and his common-law wife,[1] Leona Marshall, had lived together for approximately four years

[1] The term "common-law wife" is not used in the technical sense. Common-law marriages are not recognized in Delaware. *Owens* v. *Bentley*, 1 Terry (40 Del.) 512, 14 A. 2d 391 (Super. Ct. 1940).

prior to the Petitioner's arrest on March 17, 1965 (A 82). Some two or three years before the Petitioner's arrest, they had rented a dwelling at 617 East Fifth Street in Wilmington, Delaware (A 39, 81). The owner of the property carried Miss Marshall's name as the tenant to whom the property was rented (A 42). However, except for monies received from a roomer, the initial rental deposit and monthly rental charges were all paid for by the Petitioner (A 85).

On the morning of March 17, 1965, officers of the Wilmington Police Department discovered the victim of an apparent homicide in a junkyard (A 46). The Petitioner and a companion had been seen and apprehended by police officers at a point in the vicinity of the junkyard on the evening of March 16, 1965 (Tr. A 17-21; Tr. B 41-43).[2] Following discovery of the victim's body, police officers went to the Petitioner's East Fifth Street residence for the purpose of apprehending the Petitioner and his companion of the prior evening (A 13-15, 74).

Five police officers arrived at the Petitioner's residence at approximately 9:45 A.M. (A 74, 78). Sergeant Mackey went to the rear of the dwelling and apprehended the Petitioner in the rear yard (A 17, Tr. B 58). Sergeant Maloney knocked on the front door and was admitted by Leona Marshall (A 16, 74), who was dressed in a housecoat, or similar garment (A 18, 76). Sergeant Maloney asked for the Petitioner (A 16, 74). The persons in the house and the Petitioner were collected in the dining room, where

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[2] As used herein, Tr. A designates references to the record of Petitioner's first trial and Tr. B. to the record of Petitioner's second trial.

she observed the Petitioner and another man being directed by the police to lean against the wall (A 83). Leona Marshall was told by Sergeant Maloney to get dressed (A 30, 83), and that they were "all going downtown" (A 29, 83). No search was made of the house at that time (A 16).

The Petitioner, Miss Marshall and the other persons in the house were taken into custody and removed to the Detective Division of police headquarters (A 20, 78). Miss Marshall was seated on a bench immediately outside the Detective Division and the Petitioner was placed in a separate "recording room" (A 21, 78-79).

Shortly after arriving at the Detective Division, Miss Marshall was taken into the main area of the Detective Division, where Sergeant Maloney talked to her (A 21). At the time, the Petitioner was still situated in the recording room, which was in the same confine as the main area of the Detective Division (A 78). Although he was aware of the fact that the Petitioner and Miss Marshall lived together at the East Fifth Street house as common-law man and wife, Sergeant Maloney never did ask the Petitioner for his permission to search the house (A 25, 79-80).

At approximately 11:40 a.m. on the morning of March 17, 1965, Sergeant Maloney advised Miss Marshall that the police were investigating a burglary and a murder[2] (A 21, 25, 79) and asked for permission to search the property (A 21, 31-32, 79). Miss Marshall said "yes" (A 28). The evidence is conflicting upon whether or not Miss Marshall was told that she did not have to permit the police to search

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[2] Miss Marshall testified that this advice was not given until later (A 83-84).

the house (A 21, 31-32, 79, 83-85).* For her part, Miss Marshall testified that she "didn't know exactly what to do" when her permission to search the property was sought (A 83) and that as far as she was concerned, she had no choice but to consent (A 32, 84). As Miss Marshall phrased it, although she was apparently not frightened by the situation (A 35), ". . . they still hadn't told us what it was all about, so I just told them to go ahead in and search it" (A 83).

In the meantime, the Petitioner remained in police custody in the recording room of the Detective Division. At 11:00 a.m. on the morning of March 17th, he was formally charged with night prowling, and at 1:15 p.m. he was formally charged with burglary in the fourth degree and murder in the first degree (A 49, 96). But even prior to the time when the police apprehended the Petitioner at his home, it was clear to them that they were investigating a homicide and that the Petitioner was "considered a prime suspect" (A 13-14, 25, 79-80).

Pursuant to the permission obtained from Miss Marshall, Sergeant Maloney and Sergeant Gregg searched the Petitioner's East Fifth Street house (A 15). They seized a number of items of junk from the basement, and a jacket allegedly belonging to the Petitioner was taken from the bedroom which he and Miss Marshall occupied (A 15). The junk was identified as having come from the junkyard where the homicide victim was discovered (Tr. B 52-53).

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* "I advised her of her rights and requested permission to search the house. This permission was granted" (A 15). "I once again explained to her in the presence of Sergeant Gregg that it wasn't necessary for her, if she didn't desire to, to let us search the house" (A 15).

The jacket, which was stained with human blood of the same type as the homicide victim (Tr. B 154), was admitted into evidence together with the other items seized from the cellar of the house (Tr. B 133, 158).

The Petitioner was interrogated three times on March 17, 1965, by Detective Sergeant John Ogden—11:30 a.m., 2:50 p.m., and 7:05 p.m. At no time was the Petitioner advised by Sergeant Ogden of his right to have counsel supplied him if he was unable to afford counsel of his own choice (A 46, 47-48, 91). At 7:15 p.m. Sergeant Ogden obtained an incriminating statement from the Petitioner (A 90), which was later admitted into evidence (Tr. B 147).

The Petitioner was indicted by the Grand Jury on June 8, 1965 (A 1, dkt. entry A 1), the indictment charging him and a co-defendant with murder in the first degree, as well as other offenses (A 5-8). The Petitioner filed timely motions to suppress the evidence comprised of the product of the search of his residence on March 17, 1965 (A 9-10) and the statement obtained from him that same day (A 11-12). Both motions were denied at the beginning of Petitioner's trial (A 61, 65).

The Petitioner's first trial began on January 13, 1966 and resulted in his conviction of burglary in the fourth degree and murder in the first degree (A 1, dkt. entry 36). The Petitioner's conviction of murder in the first degree was reversed by the Delaware Supreme Court upon several grounds: the insufficiency of the evidence to establish the express malice requisite to first degree murder (A 53-56); improper jury instructions in regard to the applicable felony-murder rule (A 56-60) and error in compelling the

Petitioner to be tried jointly with his co-defendant (A 65-68). The Delaware Supreme Court upheld the search as proper (A 61-64) and *sua sponte* determined that *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) did not require the application of the standards prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to any retrial of the Petitioner (A 69-70), to which position it adhered following the grant of Petitioner's application for reargument (A 72-73).

The Petitioner's second trial began on October 2, 1967 and resulted in his being convicted of murder in the second degree (Tr. B 3, 225). Upon appeal to the Delaware Supreme Court, the conviction was affirmed (A 98-102).

Summary of Argument

This Court held in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) that the standards governing police interrogation specified by the *Miranda*[5] and *Escobedo*[6] decisions were applicable to trials begun after the date on which those decisions were announced. Against the background of the basic historical distinction between the retroactive and prospective effect of new decisions, application of the three principal criteria[7] for determining the extent of retroactiv-

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[5] *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[6] *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964).

[7] "We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*." 384 U.S. at 727.

ity confirm what the words in the *Johnson* opinion say. It is all trials subsequent to June 13, 1966 which must be conducted in accordance with *Miranda*'s standards. No exception is carved out for a retrial. To permit such an exception would be to sanction the concurrent trials of criminal defendants by different standards, one of which is inferior to the other (Argument I).

A warrantless search is generally prohibited. Exceptions have been recognized in certain cases of necessity and in the case where there has been a valid consent to the search and thereby an effective waiver of the consenter's Fourth Amendment rights. However, there is no necessity for a warrantless search of a suspect's home when he and his fellow occupants are in police custody, and when he is immediately available to give or withhold his consent to the search. Nor can the legitimacy of such a search rest upon the unknowing consent of the suspect's common-law wife, not only because she is unknowing but more important, because she cannot effectively waive his personal right to be free from an unreasonable search and seizure (Argument II).

ARGUMENT

I.

A Retrial Is a Trial and the Standards of Miranda v. Arizona, 384 U.S. 436, Apply to All Trials Commenced After June 13, 1966.

The Delaware Supreme Court concluded that unless the trial in a given case was to be the first trial of a defendant upon the particular charge involved, and unless that first trial was commenced after June 13, 1966, the requirements enunciated in *Miranda* would not, under *Johnson* v. *New Jersey*, be applicable.[8] It reached this conclusion despite its explicit recognition that the retrial of a defendant is a trial *de novo* and despite the clear specification of *Johnson* that *Miranda*'s standards were to be used for those "persons whose trials had not begun as of June 13, 1966." 384 U.S. at 734.

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[8] "It is our opinion that *Miranda* should not apply at new trial, notwithstanding the fact that it will be held after the June 13, 1966 effective date of *Miranda*. We think it neither logical nor reasonable that the retrial should be conducted under rules different from those prevailing when the cases were tried the first time. In *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), the United States Supreme Court stated: 'We hold further that Miranda applies only to cases in which the trial began after the date of our decision [June 13, 1966] * * *.' Although *de novo*, a new trial is not a new case; it is a continuation of the original case until the judgment is final. In our opinion, *Johnson* refers to 'cases' the original trial of which commenced after June 13, 1966. Neither *Miranda* nor *Johnson*, in our view, requires the courts of this State to make applicable upon retrial the *Miranda* rules which were not applicable at the original trial." 230 A 2d at 274.

Johnson[9] was the third in a trinity of cases dealing with the question of retroactivity, the other two being *Linkletter*[10] and *Tehan*.[11] In *Linkletter*, the Court held that its June 19, 1961 decision in *Mapp* v. *Ohio*[12] was inapplicable to a habeas corpus proceeding commenced after the *Mapp* decision with respect to a state court conviction in 1959 which had become "final." The word "final" was defined as describing circumstances where "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" (381 U.S. at 622, note 5). The primary distinction drawn by the Court between a prospective and retrospective ruling was that the former applied only to the instances where the conviction was not "final." The same basic distinction was drawn in *Tehan* with regard to the rule in *Griffin* v. *California*.[13] In both cases, which were habeas corpus proceedings, the Court treated a retrospective ruling as one which was also applicable to collateral attacks upon a final judgment.

It was against the background of *Linkletter* and *Tehan* that *Johnson* considered both the basic question of retro-

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[9] *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966).

[10] *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965).

[11] *Tehan* v. *Shott*, 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459 (1966).

[12] 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

[13] 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). The decision struck down the propriety of the prosecutor commenting upon the failure of the accused to testify, "because such comment 'cuts down on the privilege [against self-incrimination] by making its assertion costly.'"

activity and the further refinement of the extent of any prospective application of the *Escobedo* and *Miranda* standards. The primary issue of whether those standards should be applied retroactively was evaluated upon the basis of three principal criteria: first, the purpose of the new standards governing police interrogation; second, the reliance which may have been placed upon prior decisions; and third, the effect of a retroactive application of the standards on the administration of justice.

With regard to the first criterion, the Court concluded that the prime purpose of the rulings upon confessions was "to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice" (384 U.S. at 729).

As to the second criterion, the Court found that "law enforcement agencies fairly relied on . . . prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*" (384 U.S. at 731).

Finally, the Court determined that in the context of the third criterion, "retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards" (id.).

Upon the foregoing basis, the Court concluded that these new standards should not be applied retroactively, which is to say that they should not affect those cases in which the conviction was final (384 U.S. at 732). Although, the Court did not attribute a different weight to the three

criteria which it applied in deciding the basic retroactivity question, it manifestly did so in determining whether the prospective application should affect cases on direct appeal and not yet tried at the time the new standards were announced. For here, the Court emphasized the importance of the trial process over a consideration for the police officer who had conducted an in-custody interrogation prior to the *Escobedo* and *Miranda* decisions.

With respect to non-final cases, the Court posed the precise question controlling its decision as being:

> ". . . whether Escobedo and Miranda shall affect cases still on direct appeal when they were decided or whether their application shall commence with *trials begun after the decisions were announced*" (384 U.S. at 732).

The Court was concerned lest its *Miranda* and *Escobedo* decisions be the cause of retrials or release of previously convicted prisoners. But it was equally concerned with providing clear and certain guidelines for the conduct of future fact-finding processes through "trials."

It is difficult to conceive how the Court could have made it clearer that where a criminal defendant is put to trial after June 13, 1966, *Miranda*'s guidelines are applicable. In response to the question to be answered, the Opinion concluded:

> "All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggest that these decisions should apply only to *trials begun after the decisions were announced.* Future defendants will

benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and *trial courts* will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to *trials begun after the standards were announced* is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are not obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding Escobedo and Miranda would impose an unjustifiable burden on the administration of justice" [14] (384 U.S. at 732-733).

The Court drew a line between the cases to which *Miranda* and *Escobedo* would and would not apply. Keeping in mind the Court's stated purpose to avoid the necessity of retrial of numerous prisoners previously found guilty (384 U.S. at 732), the Court held that the two cases' guidelines should not be extended "to cases *tried* before those decisions were announced, even though the cases may still be on direct appeal" (384 U.S. at 733). That consideration has no application to the Petitioner, whose retrial was necessitated by considerations completely divorced from the implications of the *Miranda* decision.

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[14] Emphasis supplied throughout this brief unless otherwise indicated.

In reiterating its conclusion, the Court confirmed that it was the "trial" process to which the new rules applied and not simply a "case" in which some form of trial had commenced prior to the dates of the *Escobedo* and *Miranda* decisions:

> "Because Escobedo is to be applied prospectively, this holding is available only to persons whose *trials* began after June 22, 1964, the date on which Escobedo was decided.
>
> As for the standards laid down one week ago in Miranda, . . . these guidelines are . . . available only to persons whose *trials* had not begun as of June 13, 1966" [15] (384 U.S. at 734).

Indeed, when does a criminal proceeding become a "case" so that, according to the view of the Delaware Supreme Court, the time is fixed for determining *Miranda*'s applicability? When the police officer obtains the questioned statement, either before or after arrest? At the time of a preliminary hearing? Or at all proceedings following indictment, or after arraignment? Is it after commencement of any trial no matter how riddled with error that trial may be? Or is it upon commencement of a trial which, but for *Miranda*, resulted in a verdict of guilty and a judgment which has become final? It is, we suggest, the last alternative.

The prosecution of a criminal defendant calls primarily for guidance of the prosecuting attorney and the trial

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[15] On the same day as *Johnson* was decided, the Court rendered its opinion in *Davis* v. *North Carolina*, 384 U.S. 737, 739, 16 L. Ed. 2d 895, 86 S. Ct. 1701 (1966) in which the court noted that "had the *trial* in this case before us come after our decision in Miranda . . ., we would reverse summarily."

court. The police officer has already done his work, and there is no whisper in the *Johnson* opinion which would support the conclusion that any incriminating statement obtained by a police officer prior to June 13, 1966 without compliance with the *Miranda* standards, may be used in a criminal prosecution conducted after that date. Rather, by holding that the new standards would apply to a criminal defendant tried after June 13, 1966, such a statement would be inadmissible.

That guidance to the police officer and the time of obtaining the statement are of secondary significance here is confirmed by the result reached in *Stovall* v. *Denno*, 388 U.S. 293 (1967) with respect to the *Wade* and *Gilbert*[16] rulings upon a criminal suspect's right to counsel at pretrial identification. In *Stovall*, the Court said:

> "Wade and Gilbert fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel" (388 U.S. at 297).

For purposes of determining the extent of applying the *Wade-Gilbert* rules to pending cases, the Court found not the trial process, but the factors of reliance and administration of justice, as of primary concern:

> "We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case and convictions at various stages

[16] *United States* v. *Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967).

of trial and direct review. We regard all factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable" (388 U.S. at 300-301).

The result of giving emphasis to the factors of reliance and of administration of justice was to fix the critical time as that of the confrontation:

> "We hold that Wade and Gilbert affect only those cases which involve confrontations for identification purposes conducted in the absence of counsel after this date" (388 U.S. at 296).

In *Johnson* v. *New Jersey* the Court might have directed that the *Miranda* guidelines should apply only to statements taken after June 13, 1966. But it did not. It might have said that *Miranda* should apply to all cases which were not final. But it did not. It might have said that *Miranda* should control only in cases where no trial of any form had taken place before the decision was announced. But it did not. What the Court *did* do was prescribe in positive terms that the *Miranda* and *Escobedo* standards were applicable to "*trials* begun after the decisions were announced" 384 U.S. at 733, and no distinction was made between the defendant who is tried for the first time and the defendant who is being tried *de novo*, clothed with the same presumption of innocence and entitled to the same constitutional safeguards as all others.

The obvious focus of *Johnson* upon the trial process and the studied use of the word "trial" throughout the opinion have apparently prompted a majority of state

jurisdictions[17] and federal jurisdictions[18] considering the matter to conclude that a retrial subsequent to June 13,

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[17] e.g.,

Alabama: *Smith* v. *State*, 210 So. 2d 826 (Ala., 1968)
Arizona: *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966)
California: *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967)
Hawaii: *State* v. *Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966)
Indiana: *Dell* v. *State*, 231 N.E. 2d 522 (Ind., 1967)
Kansas: *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966)
Kentucky: *Creech* v. *Commonwealth*, 412 S.W. 2d 245 (Ky., 1967)
Rhode Island: *State* v. *Bradshaw*, 221 A. 2d 815 (R.I., 1966)
Wisconsin: *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N.W. 2d 458 (1967)

contra,

Illinois: *People* v. *Worley*, 37 Ill. 2d 439, 227 N.E. 2d 746 (1967)
Maryland: *Boone* v. *State*, 237 A. 2d 787 (Md., 1968)
New Jersey: *State* v. *Vigliani*, 50 N.J. 51, 232 A. 2d 129 (1967)
New York: *People* v. *Sayers*, 22 N.Y. 2d 571, 240 N.E. 2d 540 (1968)
North Carolina: *State* v. *Branch*, 11 N.C. App. 279, 161 S.E. 2d 492 (1968) and *State* v. *Lewis*, 11 N.C. App. 296, 161 S.E. 2d 497 (1968)
Tennessee: *Patten* v. *State*, 426 S.W. 2d 503 (Tenn., 1968)

[18] Third Circuit: *United States* v. *Pinto*, 259 F. Supp. 729 (D.C. N.J. 1966), aff'd per curiam 374 F. 2d 472 (3d Cir. 1967), rev'd on other grds., 389 U.S. 31 (1967); and *Virgin Islands* v. *Lovell*, 378 F. 2d 799 (3d Cir. 1960)
Fourth Circuit: *Moorer* v. *South Carolina*, 368 F. 2d 458 (4th Cir. 1968)
Fifth Circuit: *Gibson* v. *United States*, 363 F. 2d 146 (5th Cir. 1966)
Seventh Circuit: *United States* v. *Phillips*, 401 F. 2d 301 (7th Cir. 1968)
Ninth Circuit: *Amsler* v. *United States*, 381 F. 2d 37 (9th Cir. 1967) and *United States* v. *Young*, 388 F. 2d 675 (9th Cir. 1968).

1966 is governed by the new standards of *Miranda*. Thus, in *United States* v. *Phillips*, 401 F. 2d 301, 306 (7th Cir. 1968), the Court said:

> "We disagree with the government's interpretation of Johnson v. New Jersey. The Supreme Court's selection of the commencement of trial, rather than the arrest of the accused, as the critical point for determining Miranda's retroactive application is significant. It indicates that the Court's concern for fair notice to law enforcement officials focused on notice to the prosecutors rather than notice to the arresting officer . . . We interpret Johnson v. New Jersey as making Miranda applicable to all trials, including retrials, begun after June 13, 1966."

Similar views were expressed by the court in *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967):

> "Although the Court in *Johnson* in part justified *Miranda's* prospectivity upon the reliance of law enforcement agencies on cases decided before *Miranda*, the court did not accord decisive importance to the reliance of police officers on prior decisions in planning admissible custodial interrogations. The court afforded the protection of *Miranda* 'to cases in which the trial began after the date of [that] decision' (p. 721, 86 S. Ct. p. 1775); it did *not* hold that statements obtained prior to that date by methods not fully meeting the *Miranda* standard could be used in trials beginning thereafter . . .
>
> In light of the numerous considerations underlying *Miranda*, including 'the necessity for procedures which assure that the individual is accorded his privilege

under the Fifth Amendment to the Constitution not to be compelled to incriminate himself' . . . and the 'possibility of unreliable statements in every instance of in-custody interrogation' . . . , the court in *Johnson* evidently did *not* consider it unduly burdensome to require the prosecution to abstain from use of confessions obtained by methods permitted at the time of trial. . . . The court found an *'unjustifiable* burden of the administration of justice' (italics added) 384 U.S. at p. 733, 86 S. Ct. at p. 1781) only in those situations in which the application of *Miranda* would require reversal of 'convictions * * * which were obtained in trials preceding * * * *Miranda*.' (Ibid.) Thus the specific rule adopted in *Johnson* emanated from the court's expressed reluctance to 'require the retrial or release of numerous prisoners' (p. 731, 86 S. Ct. p. 1780) whose trials were untainted with errors other than a lack of compliance with the later-announced *Miranda* rule.

. . . We recognize, of course that if the prosecution is to comply with *Miranda* upon retrial it may be constrained to forego use of extrajudicial statements elicited prior to June 13, 1966, which would have been admissible under the standards set forth in *Escobedo* and *Dorado*. The burden, however, is no greater than that caused by the prosecution's inability to use statements similarly obtained against a defendant who faces trial for the first time after June 13, 1966. Since the United States Supreme Court in setting its cutoff date did not consider that burden sufficient to outweigh the need for *Miranda* protections at *trials* beginning after June 13, 1966, we must, pursuant to *Johnson*, accord defendant those safeguards upon his second trial."

In the instant case, the Delaware Supreme Court found that in three respects the Petitioner was unfairly and improperly tried. Accordingly, he was given a new trial. Neither *Miranda* nor *Johnson* have any effect upon such a case and the general administration of justice. They are, however, significant in fixing the extent to which the integrity of the trial process will be enhanced.

There is no basis in the language or logic of *Johnson* to distinguish between the defendant who was first tried and the defendant who was given a new trial after June 13, 1966. There is, however, a visible imperfection in a judicial process which would permit two presumptively innocent persons to be arrested at the same time and to be tried for the same offense on the same day in the same courthouse, to be afforded different measures of the guarantee "of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." 384 U.S. at 729.

II.

A Warrantless Search of a Suspect's Residence Based Solely Upon the Consent of a Joint Occupant Is Barred by the Fourth and Fourteenth Amendments Where the Suspect Is Immediately Available to Give or Withhold His Consent.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Over the past twenty years, this Court's opinions have made it clear that a warrantless search does not meet the requirements of the Fourth Amendment unless it can be demonstrated as being within one of the well-defined "exceptions to the rule that a search must rest upon a search warrant." *Rios* v. *United States*, 364 U.S. 253, 261, 4 L. Ed. 2d 1688, 1693, 80 S. Ct. 1431 (1960).[19] The reason for the requirement is historical[20] but regardless of how that history is viewed, it is accepted that:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment

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[19] See e.g. *Trupiano* v. *United States*, 334 U.S. 699, 92 L. Ed. 1663, 68 S. Ct. 1229 (1948); *United States* v. *Jeffers*, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951); *Jones* v. *United States*, 357 U.S. 493, 2 L. Ed. 2d 1514, 78 S. Ct. 1253 (1958); *Chapman* v. *United States*, 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776; *Camara* v. *Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *Stoner* v. *California*, 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964). There is language in some of this Court's opinions suggesting that the test of validity of a search and seizure is general reasonableness. E.g. *United States* v. *Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430 (1950) and *Cooper* v. *California*, 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788 (1967). However, both cases are within an exception to the warrant requirement. The former case involved a search incident to an arrest (see *Jones* v. *United States*, *supra* at page 499) while the latter involved the search of a motor vehicle which, under state law, the police were obligated to seize. Compare *Dyke* v. *Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (1968).

[20] *United States* v. *Rabinowitz*, 339 U.S. 56, 68-70, 94 L. Ed. 653, 661, 662, 70 S. Ct. 430, 436 (1950) (Justice Frankfurter dissenting).

to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" (*Johnson* v. *United States*, 333 U.S. 10, 14, 92 L. Ed. 436, 440, 68 S. Ct. 367, 369 (1948)).

The exceptions to the requirement "that a search must rest upon a search warrant have been jealously and carefully drawn. . . ." *Jones* v. *United States*, 357 U.S. 493, 499, 2 L. Ed. 2d 1514, 1519, 78 S. Ct. 1253, 1257 (1958). There are special rules relating to the search of motor vehicles, stemming from *Carroll* v. *United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925), and permitting a search incident to a valid arrest. *United States* v. *Rabinowitz*, *supra*. The justification for both exceptions is primarily that of necessity. See *Johnson* v. *United States*, 333 U.S. 10, 13-15, 92 L. Ed. 436, 439-441, 68 S. Ct. 367, 368, 369 (1948); *Terry* v. *Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *Schmerber* v. *California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). Neither of these exceptions is applicable here.

The third principal exception to the warrant requirement is that of consent to the proposed search and seizure. Apart

from the absence of such persuasive evidence as would translate Miss Marshall's acquiescence to the search into her having knowingly and intentionally relinquished the right to insist upon a warrant, Miss Marshall was not able to waive the Fourth Amendment rights of the Petitioner.[21]

The protection against an otherwise unconstitutional search and seizure may, of course, be effectively waived. However, the burden of establishing the constitutional validity of a waiver is upon the party relying upon that consent. *United States* v. *Jeffers*, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951).

In carrying its burden, the government is faced with a presumption against the waiver of constitutional rights. Thus, for a waiver to be effective, "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart* v. *Janis*, 384 U.S. 1, 4, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966). This presumption is a general one as pertinent to

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[21] Even if the propriety of the search is tested by some general standard of reasonableness, the circumstances incident to the search of Petitioner's home were unreasonable by any yardstick. He was in police custody and immediately available to give or withhold his consent to the search. He had been formally booked upon a patent holding charge of night prowling. He was a "prime suspect" in the homicide investigation then being conducted. He was known by the police officers to reside in the same home with Miss Marshall. Yet, no attempt was made to obtain his consent. Reliance was placed solely upon the consent of Miss Marshall, who was not even charged with a crime. To require the Petitioner's consent or, alternatively, a search warrant, was not "likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 387 U.S. 523, 533, 18 L. Ed. 2d 930, 938, 87 S. Ct. 1727, 1733 (1967). Thus, the search of his house cannot be categorized as reasonable. It may have been more convenient to simply seek Miss Marshall's consent, but convenience is not the constitutional equivalent of reasonableness. *Johnson* v. *United States*, 333 U.S. 10, 15, 92 L. Ed. 436, 441, 68 S. Ct. 367, 369 (1948).

an individual's rights under the Fourth Amendment, see *Bumper* v. *North Carolina*, 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968); *Judd* v. *United States*, 190 F. 2d 849 (D.C. Cir. 1951), as it is to those rights arising under the Fifth Amendment.[22]

The Delaware Supreme Court concurred in the view of the trial court that "Miss Marshall's consent to the search was voluntarily given." 230 A. 2d at 270. This determination was apparently based upon the following finding by the trial judge:

> ". . . the only conclusion I can reach . . . is that she didn't know there was anything in the home that she rented that would be of any value to the police. She had, in her own mind at least, nothing to lose by a search of these premises, and to imply under these circumstances that the presence of a badge negates a bare answer 'yes' when asked 'can I search your house?' it seems to me is to apply rules to her testimony which are just too weird for words. Therefore, I hold that the search was reasonable and the evidence will not be suppressed" (Tr. A 151).[23]

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[22] This Court has long remarked upon the intimate relationship between the Fourth and Fifth Amendments. *Boyd* v. *United States*, 116 U.S. 616, 633-634, 29 L. Ed. 746, 6 S. Ct. 524 (1886); *Schmerber* v. *California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). That relationship would appear to require the same degree of understanding and knowledge of one's rights under the Fourth Amendment as *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) requires to support an effective waiver of Fifth Amendment rights. *United States* v. *Moderacki*, 280 F. Supp. 633 (D.C. Del. 1968). See generally, Comment, *Consent Searches: A Reappraisal After Miranda* v. *Arizona*, 67 Col. L. Rev. 130 (1967).

[23] The same result was reached at the second trial (Tr. B 127).

In short, the Delaware courts found that because Miss Marshall felt that a search of the house would not be incriminating as to her and because she was not intimidated by the police, her consent was voluntarily[24] given and therefore constituted an effective waiver of her Fourth Amendment rights. But more was required. Her waiver had to have been knowingly and intentionally made, but it was not.

Taken at its best, the State's evidence does not establish that Miss Marshall had any comprehension of the search warrant process, requiring the determination by an impartial magistrate of whether there was probable cause to justify a search and fixing the permissible scope of the search (A 38). From her viewpoint, Miss Marshall concluded that she had no real choice in giving or withholding her consent (A 32, 84).

Without any evidence to establish even the most minimal comprehension of the Fourth Amendment's protections, the respondent failed to carry its burden in establishing an effective waiver on the part of Miss Marshall.

More fundamental than the constitutional insufficiency of Miss Marshall's waiver of her own rights is whether she also effectively waived the rights of the Petitioner. Relying upon the so-called possession and control rule, the

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[24] The characterization of Miss Marshall's consent as having been voluntary is questionable. The circumstances of her apprehension at the Petitioner's house, her transportation to the police station and the request for permission to search were instinct with coercion. See *Amos* v. *United States*, 255 U.S. 313, 65 L. Ed. 645, 41 S. Ct. 266 (1921); *Bumper* v. *North Carolina*, *supra*. As far as Miss Marshall was aware, she assumed that the police could get a search warrant and it didn't really make any difference whether or not she consented (A 32, 35-36, 84). She consented to the search simply because the police asked her to (A 36).

Delaware Supreme Court held that where one party has joint and equal (or superior) control of the premises, a search conducted pursuant to that party's consent is reasonable and that "evidence that is the product of a reasonable search may be used against anyone." 230 A. 2d at 270-271. In substance, the rule makes the validity of a search turn upon who, between the consenter and non-consenter, has the superior property interest. But as this court has held time and again, "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts." *Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 304, 18 L. Ed. 2d 782, 790, 87 S. Ct. 1642, 1648 (1967). Nor can the possession and control rule find legitimacy in any concept that Miss Marshall was impliedly authorized by the Petitioner to consent to the search for evidence to be used against him. *Stoner* v. *California*, 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964).

The "rights assured by the Fourth Amendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons* v. *United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, 1256, 88 S. Ct. 967 (1968). See also *Jones* v. *United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960); *Katz* v. *United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *Mancusi* v. *DeForte*, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1968). And this Court has long recognized that the constitutional safeguards afforded one charged with a crime can only be waived if the party charged—not some third party—so chooses. See *Fay* v.

Noia, 372 U.S. 291, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963);[25] *Brookhart* v. *Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966).

In order for consent to validate the search of an individual's home, that consent must be his and his alone. As the Arizona Supreme Court noted in *State* v. *Pina*, 94 Ariz. 243, 383 P. 2d 167 (1963), "Obviously a third person cannot waive another's basic constitutional rights against unlawful searches and seizures unless specifically authorized."

There is no justification for affording a lesser degree of protection to the individual's rights under the Fourth Amendment than are available to him under the Fifth Amendment. Both are designed to protect the suspect from being compelled to be a witness against himself. Note 22, *supra*. Whatever its modern extensions, the Fourth Amendment has at its core a prohibition of warrantless official entries designed to secure incriminating evidence against a criminal suspect. *Frank* v. *Maryland*, 359 U.S. 360, 364-365, 3 L. Ed. 2d 877, 79 S. Ct. 804 (1959). Thus, it does not follow that, because Miss Marshall might have consented to a search for purposes of obtaining evidence against her, she could consistently with the Fourth Amendment admit a police officer seeking evidence of the Petitioner's guilt.

This Court appeared to speak generally, and not solely with reference to the landlord-tenant situation, when it said in *Stoner* v. *California*, 376 U.S. 483, 488-489, 11 L. Ed. 2d 856, 860, 84 S. Ct. 889, 892, 893 (1964):

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[25] "At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief." 372 U.S. at 439.

"Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' As this Court has said, 'it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . .

It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."

Nothing more than discredited concepts of relative property rights or an unrealistic determination of apparent authority supports the warrantless search of the Petitioner's home. He might have consented to the search, but he did not. Justification for the search must, therefore, meet the primary criterion of necessity, or, at the very least, a general standard of reasonableness. Neither test is met here. The Petitioner was known to reside in the

house to be searched, was under arrest on one charge and a prime suspect of murder, was physically present in the police station and was immediately available to give or withhold his consent. To sanction the result reached by the court below, is to deprive the suspect who is absent, or taken, from his home of *his* right to be secure from unwarranted official intrusions upon his right of privacy.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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January 2, 1969

APPENDIX A

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 748.

THORNTON A. JENKINS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinions of the Supreme Court of the State of Delaware (A 52 and A 98) are reported at 230 A. 2d 262 and 240 A. 2d 146.

JURISDICTION.

The final judgment of the Supreme Court of the State of Delaware was dated March 12, 1968 and was entered on March 14, 1968 (A 103). The Petition for a Writ of Certiorari was filed on May 3, 1968, and was granted on November 18, 1968. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment, Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are set forth in Appendix A.

QUESTIONS PRESENTED.

I. Whether *Johnson v. New Jersey*, 384 U. S. 719 (1966) required that the retrial of a defendant commenced after June 13, 1966 be conducted in conformity with the standards specified in *Miranda v. Arizona*, 384 U. S. 436 (1966).

II. Whether a warrantless search of a suspect's residence based solely upon the consent of a joint occupant is barred by the Fourth and Fourteenth Amendments, where the suspect was in custody and immediately available to give or withhold his consent and where the specific purpose of the search was to obtain evidence to be used against him.

STATEMENT OF THE CASE.

The Petitioner and his common-law wife,[1] Leona Marshall, had lived together for approximately four years prior to the Petitioner's arrest on March 17, 1965 (A 82). Some two or three years before the Petitioner's arrest, they had rented a dwelling at 617 East Fifth Street in Wilmington, Delaware (A 39, 81). The owner of the property carried Miss Marshall's name as the tenant to whom the property was rented (A 42). However, except for monies received from a roomer, the initial rental deposit and monthly rental charges were all paid for by the Petitioner (A 85).

On the morning of March 17, 1965, officers of the Wilmington Police Department discovered the victim of an apparent homicide in a junkyard (A 46). The Petitioner and a companion had been seen and apprehended by police officers at a point in the vicinity of the junkyard on the evening of March 16, 1965 (Tr. A 17-21; Tr. B 41-43).[2] Following discovery of the victim's body, police officers went to the Petitioner's East Fifth Street residence for the purpose of apprehending the Petitioner and his companion of the prior evening (A 13-15, 74).

Five police officers arrived at the Petitioner's residence at approximately 9:45 A. M. (A 74, 78). Sergeant Mackey went to the rear of the dwelling and apprehended the Petitioner in the rear yard (A 17, Tr. B 58). Sergeant Maloney knocked on the front door and was admitted by Leona Marshall (A 16, 74), who was dressed in a housecoat, or similar garment (A 18, 76). Sergeant Maloney asked for the Petitioner (A 16, 74). The persons in the house

1. The term "common-law wife" is not used in the technical sense. Common-law marriages are not recognized in Delaware. *Owens v. Bentley*, 1 Terry (40 Del.) 512, 14 A. 2d 391 (Super. Ct. 1940).

2. As used herein, Tr. A. designates references to the record of Petitioner's first trial and Tr. B to the record of Petitioner's second trial.

and the Petitioner were collected in the dining room, where she observed the Petitioner and another man being directed by the police to lean against the wall (A 83). Leona Marshall was told by Sergeant Maloney to get dressed (A 30, 83), and that they were "all going downtown" (A 30, 83). No search was made of the house at that time (A 16).

The Petitioner, Miss Marshall and the other persons in the house were taken into custody and removed to the Detective Division of police headquarters (A 20, 78). Miss Marshall was seated on a bench immediately outside the Detective Division and the Petitioner was placed in a separate "recording room" (A 21, 78-79).

Shortly after arriving at the Detective Division, Miss Marshall was taken into the main area of the Detective Division, where Sergeant Maloney talked to her (A 21). At the time, the Petitioner was still situated in the recording room, which was in the same confine as the main area of the Detective Division (A 78). Although he was aware of the fact that the Petitioner and Miss Marshall lived together at the East Fifth Street house as common-law man and wife, Sergeant Maloney never did ask the Petitioner for his permission to search the house (A 25, 79-80).

At approximately 11:40 a.m. on the morning of March 17, 1965, Sergeant Maloney advised Miss Marshall that the police were investigating a burglary and a murder[3] (A 21, 25, 79) and asked for permission to search the property (A 21, 31-32, 79). Miss Marshall said "yes" (A 28). The evidence is conflicting upon whether nor not Miss Marshall was told that she did not have to permit the police to search the house (A 21, 31-32, 79, 83-85).[4] For her part, Miss

3. Miss Marshall testified that this advice was not given until later (83-84).

4. "I advised her of her rights and requested permission to search the house. This permission was granted" (A 15). "I once again explained to her in the presence of Sergeant Gregg that it wasn't necessary for her, if she didn't desire to, to let us search the house" (A 15).

Marshall testified that she "didn't know exactly what to do" when her permission to search the property was sought (A 83) and that as far as she was concerned, she had no choice but to consent (A 32, 84). As Miss Marshall phrased it, although she was apparently not frightened by the situation (A 35), ". . . . they still hadn't told us what it was all about, so I just told them to go ahead in and search it" (A 83).

In the meantime, the Petitioner remained in police custody in the recording room of the Detective Division. At 11:00 a.m. on the morning of March 17th, he was formally charged with night prowling, and at 1:15 p.m. he was formally charged with burglary in the fourth degree and murder in the first degree (A 49, 96). But even prior to the time when the police apprehended the Petitioner at his home, it was clear to them that they were investigating a homicide and that the Petitioner was "considered a prime suspect" (A 13-14, 25, 79-80).

Pursuant to the permission obtained from Miss Marshall, Sergeant Maloney and Sergeant Gregg searched the Petitioner's East Fifth Street house (A 15). They seized a number of items of junk from the basement, and a jacket allegedly belonging to the Petitioner was taken from the bedroom which he and Miss Marshall occupied (A 15). The junk was identified as having come from the junkyard where the homicide victim was discovered (Tr. B 52-53). The jacket, which was stained with human blood of the same type as the homicide victim (Tr. B 154), was admitted into evidence together with the other items seized from the cellar of the house (Tr. B 133, 158).

The Petitioner was interrogated three times on March 17, 1965, by Detective Sergeant John Ogden—11:30 a.m., 2:50 p.m., and 7:05 p.m. At no time was the Petitioner advised by Sergeant Ogden of his right to have counsel

supplied him if he was unable to afford counsel of his own choice (A 46, 47-48, 91). At 7:15 p.m. Sergeant Ogden obtained an incriminating statement from the Petitioner (A 90), which was later admitted into evidence (Tr. B 147).

The Petitioner was indicted by the Grand Jury on June 8, 1965 (A 1, dkt. entry A 1), the indictment charging him and a co-defendant with murder in the first degree, as well as other offenses (A 5-8). The Petitioner filed timely motions to suppress the evidence comprised of the product of the search of his residence on March 17, 1965 (A 9-10) and the statement obtained from him that same day (A 11-12. Both motions were denied at the beginning of Petitioner's trial (A 61, 65).

The Petitioner's first trial began on January 13, 1966 and resulted in his conviction of burglary in the fourth degree and murder in the first degree (A 1, dkt. entry 36). The Petitioner's conviction of murder in the first degree was reversed by the Delaware Supreme Court upon several grounds: the insufficiency of the evidence to establish the express malice requisite to first degree murder (A 53-56); improper jury instruction in regard to the applicable felony-murder rule (A 56-60) and error in compelling the Petitioner to be tried jointly with his co-defendant (A 55-58). The Delaware Supreme Court upheld the search as proper (A 61-64) and sua sponte determined that *Johnson v. New Jersey*, 384 U. S. 719 (1966) did not require the application of the standards prescribed by *Miranda v. Arizona*, 384 U. S. 436 (1966) to any retrial of the Petitioner (A 69-70), to which position it adhered following the grant of Petitioner's application for reargument (A 72-73).

The Petitioner's second trial began on October 2, 1967 and resulted in his being convicted of murder in the second degree (Tr. B 3, 225). Upon appeal to the Delaware Supreme Court, the conviction was affirmed (A 90-102).

SUMMARY OF ARGUMENT.

There are two interpretations of the Court's intention in formulating the language of *Johnson v. New Jersey*, 384 U. S. 719 (1966). One interpretation of the Court's intention in *Johnson* is that this Court did not consider the question of applicability of *Miranda* to retrials. The second interpretation of the Court's intention is that this Court did provide guidance on this question in its opinion in the *Johnson* case *supra*. Under either interpretation, logic dictates that *Miranda* should not apply to a retrial when its safeguards were not applicable to the original trial. In *Stovall v. Denno*, 388 U. S. 293 (1967) this Court made clear that the *Wade* and *Gilbert* safeguards would not apply to retrials.

Additionally, applying *Miranda* to retrials would serve to punish the police and society in the same way that *ex post facto* legislation would punish an individual for committing an act that was not a crime at the time he acted. (Argument I).

A mistress who has sufficient control over the premises on which certain incriminating evidence was located may consent to a search of those premises. Items seized during this lawful and reasonable search are admissible against anyone who can be related to those premises. (Argument II).

ARGUMENT.

I. The Safeguards of *Miranda v. Arizona*, 384 U. S. 436, Do Not Apply to Retrials Commencing After June 13, 1966, When the Retrial Is of a Case Which Was Tried Prior to June 13, 1966.

Petitioner asks this Court to rule that the *Miranda* safeguards do apply to retrials commencing after June 13, 1966, notwithstanding the fact that the trial in which the retrial was granted was commenced and completed prior to June 13, 1966. Some general principles concerning the retroactiveness of the *Miranda* safeguards were set forth by this Court in the case of *Johnson v. New Jersey*.[5]

Any discussion concerning the applicability of *Miranda*, must involve two separate and distinct interpretations of this Court's intentions in the Johnson case.

The first interpretation is that this Court did *not* consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* decision. The second interpretation is that this Court did consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* decision and has offered the answer to this question in the language of the *Johnson* decision. Respondent proposes to discuss this question from both viewpoints.

First, Respondent assumes that this Court did not consider the precise question in the *Johnson* case. There is an indication that this assumption is correct in the language of *Stovall v. Denno*.[6] In Stovall, this Court held that *United*

5. 384 U. S. 719.

6. 388 U. S. 293 (1967).

States v. Wade,[7] and *Gilbert v. California,*[8] require the exclusion of *identification evidence,* which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of counsel. The principles of these decisions "affect only those cases and all future cases which involved confrontations for identification purposes conducted in the absence of counsel *after this date.*"[9]

Thus, in *Stovall,* this Court held the date of confrontations to be critical, as opposed to *Johnson,* where this Court held the date of trial to be critical. Chronologically the *Stovall* decision was handed down subsequent to the *Johnson* decision. It is thus logical to assume that this Court realized that it had not considered the question of applicability to retrials in the confession cases and wanted to insure that this question was covered in the lineup cases.

Respondent would like to draw an analogy to the lineup cases and point to the *Stovall* case as its main authority for the proposition that the *Miranda* safeguards should not apply to retrials as long as the original trial was commenced and completed prior to June 13, 1966. Logic dictates that identical rules should apply to both lineups and confessions.

Secondly, Respondent would like to examine this question assuming that this Court did consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* case. The majority of the State and Federal jursidictions which have considered this question have assumed that this Court had considered the question of applicability to retrials at the time it formulated the *Johnson* decision. To

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7. 388 U. S. 218 (1967).

8. 388 U. S. 263 (1967).

9. 388 U. S. at 296. (Emphasis supplied.)

date, seven State Courts have ruled and determined that *Miranda* is not applicable to retrials.[10]

Nine States have concluded that *Miranda* is applicable to retrials.[11]

The Federal Courts in five different circuits have likewise discussed the question.[12]

10.

ILLINOIS: *People v. Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (1967).
MARYLAND: *Boone v. State*, 237 A. 2d 787 (Md., 1968).
NEW JERSEY: *State v. Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967).
NEW YORK: *People v. Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968).
NORTH CAROLINA: *State v. Branch*, 11 N. C. App. 279, 161 S. E. 2d 492 (1968) and *State v. Lewis*, 11 N. C. App. 296, 161 S. E. 2d 497 (1968).
TENNESSEE: *Patten v. State*, 426 S. W. 2d 503 (Tenn., 1968).
DELAWARE: *Jenkins v. State*, 230 A. 2d 262 (Sup. Ct., 1967).

11.

ALABAMA: *Smith v. State*, 210 So. 2d 826 (Ala., 1968).
ARIZONA: *State v. Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966).
CALIFORNIA: *People v. Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967).
HAWAII: *State v. Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966).
INDIANA: *Dell v. State*, 231 N. E. 2d 522 (Ind., 1967).
KANSAS: *State v. McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966).
KENTUCKY: *Creech v. Commonwealth*, 412 S. W. 2d 245 (Ky., 1967).
RHODE ISLAND: *State v. Bradshaw*, 221 A. 2d 815 (R. I., 1966).
WISCONSIN: *State v. Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458 (1967).

12.

THIRD CIRCUIT: *United States v. Pinto*, 259 F. Supp. 729 (D. C. N. J., 1966), aff'd per curiam 374 F. 2d 472 (3d Cir., 1967), rev'd on other grds., 389 U. S. 31 (1967); and *Virgin Islands v. Lovell*, 378 F. 2d 799 (3d Cir., 1960).
FOURTH CIRCUIT: *Moorer v. South Carolina*, 368 F. 2d 458 (4th Cir., 1968).
FIFTH CIRCUIT: *Gibson v. United States*, 363 F. 2d 146 (5th Cir., 1966).
SEVENTH CIRCUIT: *United States v. Phillips*, 401 F. 2d 301 (7th Cir., 1968).
NINTH CIRCUIT: *Amsler v. United States*, 381 F. 2d 37 (9th Cir., 1967) and *United States v. Young*, 388 F. 2d 675 (9th Cir., 1968).

Most of the State cases supporting Petitioner's viewpoint that *Miranda* is applicable to retrials have so determined on the definition of the word "trial" as set forth in the *Johnson* case. These courts have ruled that the term "retrial" is subsumed in the term "trial". The courts in two of those states have relied upon State statutes as support for ruling *Miranda* to be applicable to retrials.[13]

There is much additional language in the *Johnson* case which must be scrutinized and examined in an effort to obtain the court's message. This Court states at one portion of the *Johnson* opinion,

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test."[14]

It certainly cannot be said that Petitioner, Thornton Jenkins, who had been arrested and in custody since March 17, 1965, on this charge is a future defendant. The Petitioner in this case has been a defendant for over one year prior to *Miranda*. Properly he should be designated a past defendant and not a future defendant.

A close reading of the *Johnson* decision indicates other language which supports the classification of a defendant in a retrial as a past defendant. That language states:

> "Escobedo and Miranda should apply only to cases commenced after those decisions were announced."[15]

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13. ARIZONA: *State v. Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966). CALIFORNIA: *People v. Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967).

14. 384 U. S. at 732.

15. 384 U. S. at 733.

The term "case" usually means the complete history of the judicial proceedings against a defendant when a claim or contention of one party takes such a form that the judicial power is capable of acting upon it.[16] The Supreme Court of New Jersey has pointed out and interpreted "cases commenced" to refer to cases in which the first judicial step was taken after *Miranda*.[17]

The Supreme Court of New Jersey stated that its view

> "accords with a commonplace of the criminal law in this country, i.e., an order for a new trial as an incident of a reversal of a conviction on appeal simply amounts to a continuance of the same case looking toward a final judgment of either acquittal or conviction."[18]

Thus, there are three phrases in *Johnson* in addition to "trial". Those words are "future defendants", "past defendants" and "cases commenced". These phrases all shed light on this Court's meaning of the word "trial". These indicate that this Court did not intend the word "retrial" to be subsumed in the word "trial."

Throughout the *Johnson* opinion, a reader discerns the concern of this Court for police reliance and the potential burden on the administration of justice. This Court felt that although some past or pending cases might be tainted by improperly obtained confessions, the discrimination against those defendants would be outweighed by "the exigencies of the situation."[19]

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16. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125 (1894).

17. *State v. Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967).

18. *Id.*

19. 384 U. S. at 727, 728-29.

The reliance of law enforcement officials on certain standards prior to *Escobedo* and *Miranda* is discussed in the following language from the *Johnson* decision:

> "Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. This is in favorable comparison to the situation before *Mapp v. Ohio*, . . ., where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf v. Colorado* . . .[20]
>
> ". . . Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege."[21]

In a situation such as the present appeal, the police should not be punished or penalized for relying on the law previously announced at the time of interrogation. The State of Delaware should not be disadvantaged because Petitioner's appeal to the State Supreme Court resulted in a reversal and remand for a new trial. This Petitioner should not be given a favorable position over a defendant who was arrested at the same time and who confessed at the same time, but whose conviction was upheld.

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20. 384 U. S. at 731.
21. 384 U. S. at 732.

It is axiomatic that the administration of justice must achieve a balance between the interest of society and protection of a defendant's constitutional rights. Therefore, some discussion about the interest of society is warranted.

In many retrial situations where *Miranda* safeguards are held applicable, the result will be a dismissal of prosecution by the State. Since a retrial would not occur until two or three years after the incident, the police would have a very difficult task in gathering additional evidence to compensate for the inadmissibility of the confession. This situation is far different from the normal case where the police, with knowledge of the constitutional safeguards set forth in *Miranda* have the opportunity to gather the evidence necessary for prosecution. However, in the retrial situation, the police justifiably have relied upon the admissibility tests that were the law at the time of the confession and may have not taken the opportunity to gather fresh evidence. Thus, a ruling that *Miranda* is applicable to retrial could tend to push the scales of justice out of balance and away from society's interest.

Whenever and wherever possible, the administration of justice should not culminate in an illogical result. "Illogical" is the only description which can be placed on a situation where the police and the prosecution are barred from presenting evidence at a retrial when that evidence was legally and constitutionally admissible at the original trial.

One purpose of the *Miranda* decision was to set certain standards in police conduct. *Miranda* made explicit what conduct is required of the police in seeking a confession. Applying *ex post facto* safeguards to a retrial would in no way serve the purpose of instructing the police what conduct is required in the taking of a confession. The

police and society should not be punished for not adhering to rules which were not in existence at the time that they acted. The administration of justice requires this Court to rule that the *Miranda* safeguards are not applicable to retrials, when the original trial was commenced and terminated prior to June 13, 1966.

II. The Search of Petitioner's Girlfriend's Home Pursuant to the Consent of Petitioner's Girlfriend Is a Proper Search.

On page 25 of Petitioner's brief, Petitioner contends that the tenant's consent to search her home was not voluntarily given. On this point, Petitioner contends that the police did not go far enough in advising her what constituted probable cause in obtaining a search warrant. This contention can be readily answered by pointing to the testimony of Sgt. Maloney, appearing at page 75 of the joint appendix.[22] These statements by the tenant show voluntariness. The Petitioner passes this point quickly in his brief and gets to what he considers the main point, namely whether Miss Marshall can effectively waive the rights of the Petitioner. There is a vast amount of Federal and State authority which has upheld the constitutionality of searches and seizures where the consenting person posssesses sufficient control of the premises.[23]

As the Delaware Supreme Court stated in its opinion:[24]

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22. After I requested this I also informed her that we were investigating a complaint of murder. She stated that she had nothing to hide, that I could search her house as she knew I could get a search warrant if I wanted to.

23. Annotation 31 A. L. R. 2d 1078; Third party consent to search and seizure, 33 University of Chicago Law Review 797, 801 (1966).

24. *State v. Jenkins*, 230 A. 2d 262, 269-271 (1967).

"'Sufficient control' is more frequently predicated upon a joint and equal possession and control of the premises searched."[25]

The Delaware Supreme Court goes on to explain the sufficient control theory as follows:[26]

"The line of reasoning which underlines the joint control doctrine may be stated as follows: the consenting person has the authority, acting in his own behalf and not as agent for the nonconsenter, to permit a search of premises to which he has immediate right of possession and control; a search pursuant to such consent is reasonable, absent other circumstances tending to make it unreasonable; evidence that is the product of a reasonable search may be used against anyone."

Considering the case at hand, it is clear that the status of Miss Marshall, when viewed most favorably for Peti-

25. The cases often involve spousal relationships, but are not limited thereto. For cases upholding a wife's consent as against her husband, see e.g., *State v. Cairo*, 74 R. I. 377, 60 A. 2d 841 (1948); *People v. Harvey*, 48 Ill. App. 2d 261, 199 N. E. 2d 236 (1964); *Bellam v. State*, 233 Md. 368, 196 A. 2d 891 (1964); *People v. Carter*, 48 Cal. 2d 737, 312 P. 2d 655 (1967); *United States v. Heine* (2 Cir., 1945), 149 F. 2d 485; *United States v. Sergio* (E. D. N. Y., 1937), 21 F. Supp. 553. It has been recognized that it is not the marital status, but rather the joint control and possession of the couple's premises that establishes the wife's authority to give an effective consent. See *Roberts v. United States* (8 Cir., 1964), 332 F. 2d 892; *State v. Hall*, 264 N. C. 559, 142 S. E. 2d 177 (1965); *People v. Perroni*, 14 Ill. 2d 581, 153 N. E. 2d 578 (1958). For cases not involving spousal relationships, but nonetheless upholding third person consent on the basis of joint control, see e.g., *United States v. Sferas* (7 Cir., 1954), 210 F. 2d 69 (partner of defendant); *Nestor v. State*, 243 Md. 438, 221 A. 2d 364 (1966) (co-tenant with defendant); *People v. Howard*, 166 Cal. App. 2d 638, 334 P. 2d 105, 106 (1958) (mistress of defendant); *People v. Silva*, 140 Cal. App. 2d 791, 295 P. 2d 942 (1956) (brother of defendant's mistress who lived on the premises).

26. *Id.* at 270.

tioner, is that of a joint occupant with Petitioner. It is further clear that Miss Marshall, as the sole legal tenant, had the superior right of possession and control of the premises as between Petitioner and herself. Because of her sufficient control, she is able to give her consent to the search of the premises. Because of her consent, the ensuing search was reasonable, and the fruits of that search are admissible against *Jenkins*.

Petitioner relies heavily in his brief at pages 27 through 29 on the case of *Stoner v. California*, 376 U. S. 483, 84 S. Ct. 889 (1964). Respondent notes the fact that this Court emphasized the personal nature of the right against unreasonable searches and seizures in *Stoner, supra*. However, there is a vast difference between the facts of *Stoner* and the facts in the case at hand. In *Stoner*, it was a hotel desk clerk who consented to the search of a hotel guest's room. The hotel clerk's right to possession and control of that room was inferior to the right of possession and control of the hotel guest. In this case, the right of Miss Marshall to possession and control of this house in which she was the legal tenant is greater than the right of Petitioner Jenkins to possession and control of this house.

It is interesting to note that the United States Court of Appeals for the Fifth Circuit in a most recent opinion, (not yet reported), discussed the question of who may consent to a search in the case of *Gurlewski v. United States*.[27] The Fifth Circuit emphasized that a wife has one advantage over a mere mistress. Only a wife, and not a mistress, is *incapable* of validly waiving her husband's objection to a warrantless search. On the other hand, a mistress is nothing more than a friend who may waive any objection her paramour may have to a search.

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27. CrL 2258 *Gerler v. United States*, C. A. 5, 11-27-1968.

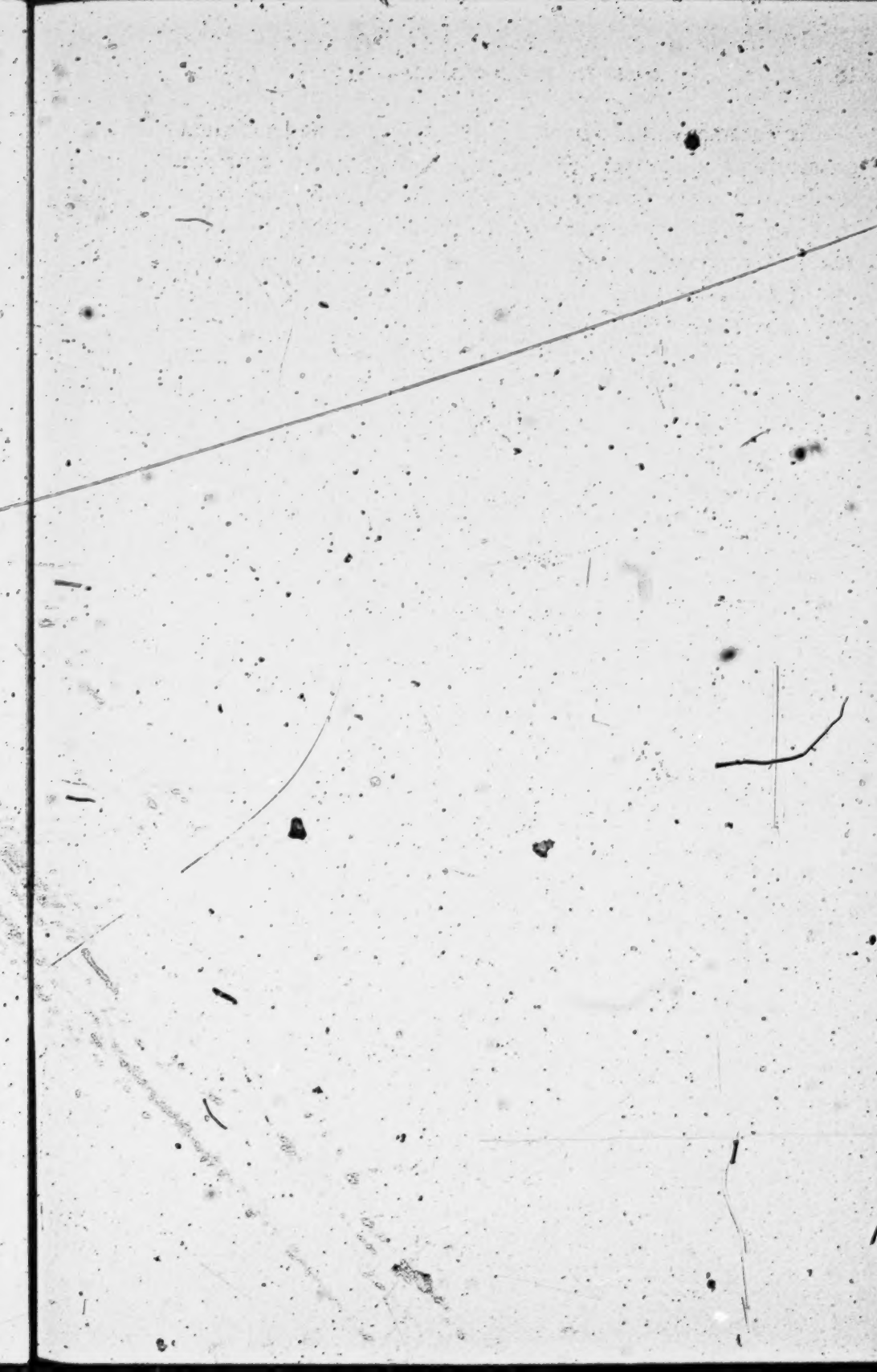
In summary, it is clear that Miss Marshall had sufficient possession and control of the premises searched to give her consent for a search of those premises. It is further clear that she was not coerced into giving her consent, but consented freely and voluntarily. Thus, the search of Leona Marshall's home was reasonable and lawful. The fruits of this reasonable and lawful search are admissible into evidence against Petitioner Jenkins.

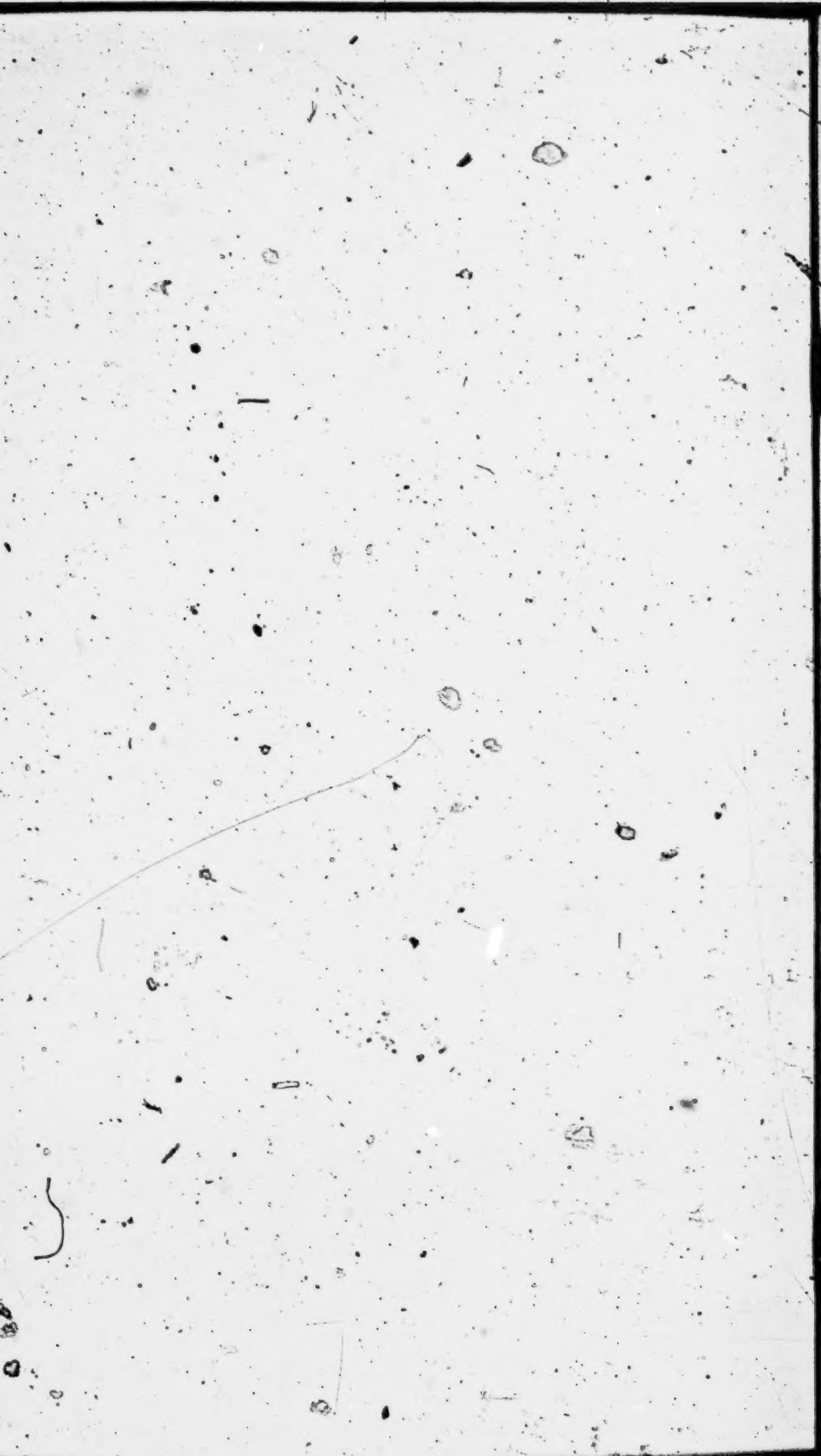
CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

JAY H. CONNER,
Deputy Attorney General,
Attorney for Respondent





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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against

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Question Presented

Should the standards of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478 be retrospectively applied on retrials to the admission of voluntary confessions exempt from those standards under *Johnson* v. *New Jersey*, 384 U. S. 719?

Interest of *Amicus*

The granting of certiorari in this case brings before the Court the question of whether the admissibility of voluntary confessions validly introduced at trial before June

13, 1966, the date of this Court's decision in *Miranda*,* should be affected by the explicit standards set forth in that opinion if the defendant is retried thereafter.

As chief law enforcement officer for the State, the New York Attorney General is concerned with the effect which an adverse decision would have upon a substantial number of criminal convictions. New York is one of the seven states** whose highest court has held that the standards of *Miranda* do not govern the admissibility of confessions in such cases.

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* The applicability of the decisions in *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478 to retrials after June 13, 1966 and June 22, 1964, respectively, present the same issue. Because the decision in *Miranda* is so much broader in scope, we will refer to the general question as the applicability of *Miranda*.

** The States whose courts have so held are as follows:

Delaware:	*Jenkins* v. *State*, 230 A. 2d 262 (Sup. Ct. Del. 1967); *Jenkins* v. *State*, 240 A. 2d 146 (Sup. Ct. Del. 240 A. 2d 146).
Illinois:	*People* v. *Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (Sup. Ct. Ill. 1967).
Maryland:	*Boone* v. *State*, 3 Md. A. 11, 237 A. 2d 787 (Ct. of Spec. App. Md. 1968), *cert. denied*.
New Jersey:	*State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (Sup. Ct. N. J. 1967).
New York:	*People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (Ct. App. N. Y. 1968).
North Carolina:	*State* v. *Branch*, 1 N. C. App. 279, 161 S. E. 2d 492 (Ct. App. N. C. 1968); *State* v. *Lewis*, 1 N. C. App. 296, 161 S. E. 2d 497 (Ct. App. N. C. 1968).
Tennessee:	*Murphy* v. *State*, 426 S. W. 2d 509 (Sup. Ct. Tenn. 1968); *Patten* v. *State*, 426 S. W. 2d 503 (Sup. Ct. Tenn. 1968).

Eight states have made a contrary determination. They are as follows:

Alabama:	*Smith* v. *State*, 210 So. 2d 826 (Sup. Ct. Ala. 1968).

(Footnote continued on following page)

Like the other state courts which have made this decision, the New York courts have relied on the non-applicability of *Miranda* in reversing subsequent cases. A larger number of such cases exist than might be imagined since the rapid changes which are occurring in every area of criminal law and procedure have resulted in a great many reversals of criminal convictions particularly in states which are sensitive to the rights of defendants and to demands for improvements in the criminal process.

(*Footnote continued from previous page*)

Arizona: *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (Sup. Ct. Ariz. 1966).

California: *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (Sup. Ct. Cal. 1967); *People* v. *Collins*, 66 Cal. Rptr. 497, 438 P. 2d 33 (Sup. Ct. Cal. In Bank 1968); but see *People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P. 2d 600 (Sup. Ct. Cal. In Bank 1967).

Hawaii: *State* v. *Ruiz*, 49 Haw. 504. 421 P. 2d 305 (Sup. Ct. Haw. 1966).

Indiana: *Dell* v. *State*, 231 N. E. 2d 522 (Sup. Ct. Ind. 1967); *Beck* v. *State*, 235 N. E. 2d 699 (Sup. Ct. Ind. 1968).

Kansas: *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (Sup. Ct. Kan. 1966).

Kentucky: *Creech* v. *Commonwealth*, 412 S. W. 2d 245 (Ct. App. Ky. 1967).

Wisconsin: *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458 (Sup. Ct. Wis., 1967).

The question has not been considered in any reported case in Rhode Island. However, in reversing a conviction on other grounds the Court stated that it did not reach the question of whether *Miranda* applied on retrial, but indicated that it might so hold. *State* v. *Bradshaw*, 221 A. 2d 815, 817 n. 1 (Sup. Ct. R. I. 1966).

Five Circuit Courts of Appeals have held that *Miranda* does apply on retrial. They are as follows:

Third Circuit: *Virgin Islands* v. *Lovell*, 378 F. 2d 799 (3rd Cir. 1967); also see *United States ex rel. Pierce* v.

(*Footnote continued on following page*)

Thus, in New York a considerable number of cases would be directly affected by this Court's reversal of the decision of the Delaware Supreme Court.

The New York Attorney General has appeared either as counsel or *amicus* in several of the cases dealing with the applicability to earlier convictions of newly developed rules enunciated by this Court. *Linkletter* v. *Walker*, 381 U. S. 618; *Angelet* v. *Fay*, 381 U. S. 643; *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293. Also see *People* v. *McQueen*, 18 N. Y. 2d 337, 274 N.Y.S. 2d 886, 21 N. E. 2d 550 (1966) in which the Court of Appeals held that it would not give retrospective application to this Court's decisions in *Miranda* and *Escobedo*. Consistent with our position in those cases, we urge in this brief that the Court adhere to its reasoning in *Johnson* v. *New Jersey* not to disturb prior convictions in light of the specific standards newly enunciated in *Miranda* and not to require that those standards be applied to past convictions merely because a retrial is ordered. This brief is limited to that question and does not deal with the specific facts of the instant case or the Fourth Amendment issue presented therein.

(*Footnote continued from previous page*)

Pinto, 259 F. Supp. 729 (D.C.N.J. 1966), *aff'd per curiam* 374 F. 2d 472 (3rd Cir. 1967) *rev'd* 389 U. S. 31 (1967); but see *Vigliano* v. *Thevos*, 390 F. 2d 55 (3rd Cir. 1968).

Fourth Circuit: *Moorer* v. *South Carolina*, 368 F. 2d 458 (4th Cir. 1968).

Fifth Circuit: *Gibson* v. *United States*, 363 F. 2d 146 (5th Cir. 1966).

Seventh Circuit: *United States* v. *Phillips*, 401 F. 2d 301 (7th Cir. 1968).

Ninth Circuit: *Amsler* v. *United States*, 381 F. 2d 37 (9th Cir. 1967); *United States ex rel. Walker* v. *Young*, 388 F. 2d 675 (9th Cir. 1968).

ARGUMENT

The strict standards of *Miranda* should not be applied to retrials in cases originally tried before June 13, 1966.

In limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 to cases whose trials began after June 13, 1966 this Court created a finite identifiable group of confessions whose admissibility was to be determined by "meticulous" (*Johnson* v. *New Jersey*, 384 U. S. 719, 730), standards of voluntariness, but not by *Miranda's* positive regulations for in-custody interrogation. As of June 13, 1966 any defendant, defense lawyer, prosecutor or judge could determine whether the admissibility of a confession would be judged by the standards of *Miranda* or on voluntariness alone. The discrete group of confessions exempt from *Miranda* were frozen as of June 13.

Petitioner Jenkins, whose trial began on January 10, 1966, knew after reading *Johnson* v. *New Jersey* that his confession was to be judged on the basis of voluntariness. To disturb that position would create unnecessary confusion in the administration of justice and violate the very purpose of this Court's decision in *Johnson* v. *New Jersey*, *supra*. That purpose was to limit the burden created by the revolutionary standards in *Miranda* on the administration of justice and on law enforcement officers who had justly relied on previous delineations of constitutional requirements. Few if any jurisdictions had fully met these standards previously. *Johnson* v. *New Jersey*, *supra* at 731. The purpose of *Miranda*, itself, was to set minimum constitutional standards for in-custody interrogation. Obviously, this decision looked to the future rather than to the past.

The confession which is the subject of the instant case was made on March 17, 1965. The case of which it is a part was first investigated and put before the jury begin-

ning on January 10, 1966. In *Johnson* v. *New Jersey, supra*, this Court specifically held that the admissibility of Jenkins' confession at trial was to be judged on the basis of voluntariness alone. Application of the *Miranda* rule cannot change the interrogation which has already occurred nor expand the investigation to produce other evidence as a substitute for the allegedly invalid confession.

The reasons which prompted this Court to limit retroactive application of several of its recent decisions* requires those limitations be absolute and not subject to change. In the present era of revolution in the criminal law it would discourage state courts and lower federal courts from continuing to expand concepts of fairness to criminal defendants if they knew that reversal of a case would further jeopardize the prosecution. This is not merely an academic observation, for most of the courts which have dealt with the applicability of *Miranda* on retrial have been aware of the effect of their decisions on the future prosecution of the defendant, since they predicted the problem on the reversal of the original trial rather than on the appeal from retrial. Of the 25 cases which have dealt with the issue of whether *Miranda* ought to apply on retrials, that question was decided by the jurisdiction before retrial in 20. In two of those cases the decision of whether to apply *Miranda* was made at the request of the prosecutor. *People* v. *Worley, supra; Smith* v. *State, supra.* In one case the decision was made after a pre-retrial motion to suppress the confession. *People* v. *Say-*

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* *Linkletter* v. *Walker*, 381 U. S. 618 (limiting the effect of *Mapp* v. *Ohio*, 367 U. S. 643); *Tehan* v. *Shott*, 382 U. S. 406 (limiting the effect of *Griffin* v. *California*, 380 U. S. 609); *Johnson* v. *New Jersey*, 384 U. S. 719 (limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478); *Stovall* v. *Denno*, 388 U. S. 293 (limiting the effect of *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v *California*, 388 U. S. 263); *DeStefano* v. *Woods*, 392 U. S. 631 (limiting the effect of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194); *Fuller* v. *Alaska*, 393 U. S. 80 (limiting the effect of *Lee* v. *Florida*, 392 U. S. 378.

ers, supra. In only four cases was the decision made after retrial. *United States* v. *Phillips, supra; State* v. *Lewis, supra; Murphy* v. *State, supra; Boone* v. *State, supra.*

The principal rationale for holding that *Miranda* should apply on retrial is reliance on the word "trial" in the *Johnson* opinion:

> "We hold that *Escobedo* attacks only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago [June 13, 1966]". 384 U. S. 719, 721.

Indeed, most of the decisions which have applied *Miranda* to retrials have involved little or no discussion of the issue and looked no farther than that word "trial". The only case so holding that involves any discussion of the question is *People* v. *Doherty, supra* in which California applied *Miranda* to retrials. Of course, it should be remembered that California had anticipated the *Miranda* rules in *People* v. *Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (Sup. Ct. in Bank, 1965) which was applied retroactively to cases on direct appeal. *In re Lopez,* 62 A. C. 380, 42 Cal. Rptr. 188, 398 P. 2d 380, 383 (Sup. Ct. Cal. 1965). By contrast, in four of those 13 courts dissenting opinions discussed the issue fully. *State* v. *Shoffner, supra,* 143 N. W. 2d 458, 475; *State* v. *Brock, supra,* 416 P. 2d 601, 605; *State* v. *McCarther, supra,* 416 P. 2d 290, 296; *People* v. *Doherty, supra,* 59 Cal. Rptr. 857, 866. There also is very complete discussion of the issues in all of the cases which held that *Miranda* does not apply on retrial. *People* v. *Sayers, supra, State* v. *Branch, supra, Murphy* v. *State, supra, Vigliano* v. *Thevos, supra, Boone* v. *State, supra.* But see two dissents *People* v. *Sayers, supra,* 240 N. E. 2d at 543 (based on the opinion of the Appellate Division below. *People* v.

Sayers, 28 A. D. 2d 227, 284 N.Y.S. 2d 481-2 [3rd Dept. 1967]); *Boone* v. *State, supra*, 237 A. 2d 787, 803.

In the cases holding that *Miranda* should not apply on retrial, courts have pointed to other language in *Johnson* which supports their interpretation. For instance, the reference to "future defendants" as opposed to "past defendants" (*Id.* at 732) has frequently been cited. It has also been suggested that retrial does not represent the inception of a new case for purposes of determining whether defendant has twice been put in jeopardy and therefore should not be the inception of a new case for purposes of expanding the retrospective application of *Miranda*. *Patten* v. *State, supra*, 426 S. W. 2d 503, 505; *State* v. *Shoffner, supra*, 143 N. W. 2d 458, 475.

While it is true that a number of jurisdictions have held that *Miranda* applies to retrials (see note at pp. 2-4). If this Court affirms the decision below it would not necesarily alter the independent determination by other jurisdictions to apply *Miranda*. In *Johnson* v. *New Jersey* this Court specifically reserved the power of the states to ". . . apply those standards in a broader range of cases than is required by this decision."

In any case, it is the logic not the language of *Johnson* v. *New Jersey* which is essential in determining the extent to which *Miranda* and *Escobedo* are to be applied retrospectively. Of course, the purpose of the cut-off date in *Johnson* was to limit retrospectivity even more stringently than was done in *Linkletter*. Then see *Stovall* v. *Denno*. In *Johnson* this Court held that the purpose of the *Miranda* rule will not be defeated if it were to be applied only to "future defendants". Since its primary aim was to change the circumstances in interrogation its purpose cannot be achieved at all in applying the decision retrospectively.

The reliance of law enforcement officers on the previously enunciated standards of voluntariness have been well

described in this Court's decision in *Johnson* v. *New Jersey, supra,* at 731-3. That reliance is in no way altered because retrial is ordered for independent reasons. Indeed, it is likely that the dependence on the confession in such cases would be increased because of whatever defect caused the reversal in the first place.

In the interrogation, in the investigation in chief, and in the preparation for trial, the confession was undoubtedly an integral part of the prosecution's case. Other evidence may have been a direct result of this voluntary confession. It is difficult enough to re-present a case on retrial, sometimes years after the events in question, without having to excise significant portions of reliable evidence.

This Court in *Johnson* held that the meticulous standards of voluntariness were sufficient protection to "past defendants". If anything, this is more true of defendants who will be subject to retrial. They may well have an opportunity to challenge the voluntariness of the confessions at least if the prior determination has been faulty in any respect. See dissent in *People* v. *Sayers, supra,* 284 N.Y.S. 2d at 483. Furthermore, their claims have been thoroughly decided by the Court which was careful enough to reverse their convictions.

In the courts which held that *Miranda* was inapplicable to retrial, the reversing courts did consider contentions that the admissions were improperly obtained. However, in 10 cases ruling the other way, the reversing courts refused to consider attacks on the confessions because they would either be inadmissible under *Miranda* or at least had to be reconsidered in light thereof. *Moorer* v. *South Carolina; United States ex rel. Walker* v. *Young; United States* v. *Phillips; State* v. *Shoffner; State* v. *McCarther; State* v. *Ruiz; Creech* v. *Commonwealth; State* v. *Jackson; People* v. *Doherty; Dell* v. *State; Smith* v. *State.* It is therefore possible that certain of these confessions were inad-

missible under either standard (see, *e.g.*, *People* v. *Doherty*, *State* v. *McCarther*, in which certain admissions were declared invalid) and that the casual adoption of the rule applying *Miranda* to retrials avoided a more difficult decision in the particular case in which it was enunciated.

Indeed, it is possible that the confession could have produced other evidence which might be similarly inadmissible as fruit of the poisoned tree *People* v. *Jackson*, *supra*, 429 P. 2d 600, 603. Cf. *People* v. *Chapman*, 67 Cal. Rptr. 601 (Ct. App., 2d Dist. Div. 4, 1968). Thus it can be assumed that retrial would be impossible in a substantial number of cases if the *Miranda* rules were applied. For instance, in *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (Ct. App. N. Y. 1968), the case in which the New York Court of Appeals held that *Miranda* did not apply to retrials, the District Attorney had appealed the suppression of the confession. In order to do this under Code of Criminal Procedure §§ 518(6), 518-a he was required to affirm under oath that trial would be impossible without the use of the confession. Another instance where retrial would be impossible without the confession in question is presented by the Maryland case, *Boone* v. *State*, *supra*. Defendant Boone was indicted with three other persons charged with felony murder. His trial was severed from that of his co-defendants and he was granted a change of venue. The jury returned a verdict of guilty of murder, without specifying the degree, in that trial which took place before the decision of this Court in *Miranda*. A new trial was granted and held after *Miranda*. The evidence against him consisted of testimony of one of his co-defendants which was corroborated by a substantial amount of evidence. The Court on retrial had applied the standards of *Miranda* and had suppressed Boone's confession which had previously been found to be voluntary. On appeal the Court of Special Appeals held that without the confes-

sion there was insufficient corroboration of the identity of Boone. However, it held that the court below had erred in suppressing the confession and established Maryland's rule that *Miranda* should not apply on retrials.

In *Johnson* v. *New Jersey, supra,* this Court held that the procedure for testing the voluntariness of a confession was adequate "to protect the integrity of the truth-determining process : . . .". *Id.* at 729. Courts and prosecutors have relied on this procedure in cases tried before June 13, 1966. As this Court specifically indicated in *Johnson v. New Jersey, supra,* the standards of voluntariness have become stricter in recent years (*Id.* at 730). In many of the cases which will be affected by the rule which this Court adopts in this case the admissibility of the confession has been considered in more than one proceeding. In particular, the decision of this Court in *Jackson* v. *Denno,* 378 U. S. 368 required a new hearing in a large number of cases. That decision is of particular significance when read in the light of *Johnson* v. *New Jersey.* It requires a severable legal determination on the issue of voluntariness of the confession. Therefore, if the standards of *Jackson* v. *Denno* have been met at the original trial there would be no necessity of redetermining the admissibility of the confession on retrial. See Justice Herlihy's dissent in *People* v. *Sayers, supra,* 284 N.Y.S. 2d 481, 482. Combined with the meticulous test of voluntariness and the severability of that proceeding from the trial in chief there is no reason to eliminate previously admissible confessions merely because a case is ordered retried.

There is only one valid distinction between general retrospective application of *Miranda* and the specific retrospective application of *Miranda* on retrials. That is the scope of its interference with the administration of justice. This distinction was made by the California Supreme

Court in *People* v. *Doherty, supra*, 59 Cal. Rptr. 857 at 863. Since California had already adopted the *Miranda* rule, the burden on the administration of justice in that state was considerably less than that experienced in other states. Furthermore, subsequent developments in the criminal law have increased the likelihood of retrials which would be affected by this rule. We are in a period of convulsive change in criminal practice. There is practically no area of criminal law which is not experiencing dramatic changes. Thus, reversals and subsequent retrials in this area have become increasingly common.

The cases cited in the note on pp. 2-4, *supra*, offer interesting examples of the span of issues on which reversal in criminal cases may be based. They range from technical questions of the number of jurors in the jury room (*Patten* v. *State**) to substantial questions of an appropriate insanity rule (*State* v. *Vigliano; State* v. *Shoffner*). The other errors for which the original trials were reversed are: an impermissibly low sentence (*Murphy* v. *State*); the failure to give the defendants the names of the jurors before selection and the number of challenges afforded to them (*Amsler* v. *United States*); the jury's failure to specify whether a verdict was for first or second degree murder (*Boone* v. *State*); the introduction of an admission by a principal of a crime against the defendant in his trial as an aider and abettor (*Dell* v. *State*); the admission of records of a co-defendant's guilty pleas when he took the stand (*State* v. *Jackson*); improper cross-examination of one defendant—convictions of the two defendants reversed (*People* v. *Sayers*); evidence on a second count introduced against a co-defendant in a joint trial without instructing

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* Because all the cases listed hereafter are cited in the footnote at pp. 2-4, *supra* and in the Table of Cases, no citation reference is given in the text.

the jury that the defendant had been acquitted of that charge (*United States* v. *Phillips*); excessive cross-examination of a defendant about prior crimes (*People* v. *Worley*); introduction of hearsay testimony (*Gibson* v. *United States*); miscellaneous trial errors (*United States ex rel. Walker* v. *Young*); reference by prosecutor to evidence outside the record (*Smith* v. *State*); denial of motion to produce police officer's report (*State* v. *Bradshaw*); reversal for hearing as to whether disclosure of certain government reports should be required in a territory under the supervisory power of the Court of Appeals (*Virgin Islands* v. *Lovell*); reference in opening to a confession which was not introduced (*Moorer* v. *South Carolina*); erroneous instructions on murder count (*Jenkins* v. *Delaware; State* v. *Brock*); plain error in finding of fact by the trial court (*State* v. *Ruiz*); non-representation by counsel in a 20 year old conviction (*State* v. *Branch*). Two of the cases were reversed solely on grounds relating to other confessions which would require redetermination of the admissibility of confessions in any event (*People* v. *Doherty; State* v. *McCarther*).

It also may be expected that many retrials will be ordered on the basis of this Court's decision in *Bruton* v. *United States*, 391 U. S. 123 which was declared retroactive in *Roberts* v. *Russell*, 392 U. S. 293. While the breadth of the decision in *Bruton* is still subject to question,* many cases have been reversed on that ground, each of which involves the confession of a least one defendant. For instance in New York alone, at least 14 reported cases

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* The question is raised in another case before this Court this Term. *People* v. *Bosby*, 64 Cal. Rptr. 159 (1967), cert. granted November 19, 1968, sub nom. *Harrington* v. *California*, No. 750 OT 1968, 37 L. W. 3185

have recently been reversed and retrials ordered.* The New York courts have been liberal in reversing the convictions of the confessing co-defendants in Bruton cases. See, *e.g. People* v. *Baker, supra; People* v. *Balatnicov, supra.*

From this sample it can be interpolated that many hundreds of cases which were originally tried before *Miranda* will be ordered retried in the future. As major changes occur in the criminal law and modifications are made thereon it can be expected that many previous trials will be affected and even rules which have occurred before the original trial may well not have been assimiliated by prosecutors, defense lawyers and the courts.

In fact, some cases are reversed on collateral attack and therefore raise a question as to the meaning of *Linkletter* v. *Walker*, 381 U. S. 618 as well as to the meaning of *Johnson* v. *New Jersey*. In *Linkletter* this Court held that the decision in *Mapp* v. *Ohio* was not to be applied to cases where direct appeal had been completed prior to its decision. We have found no cases dealing with the question of whether *Mapp* would apply to retrial if a case final when *Mapp* was decided was thereafter re-

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* *People* v. *Miranda*, —— N. Y. 2d ——, vol. 30 No. 16 L. Rep. News January 29, 1969 (N. Y. Ct. App. dec'd January 9, 1969); *People* v. *Baker*, 23 N. Y. 2d 307 (N. Y. Ct. App. 1968); *People* v. *Pohl*, 23 N. Y. 2d —— (N. Y. Ct. App. 1968); *People* v. *Ceforo*, 23 N. Y. 2d 283 (N. Y. Ct. App. 1968); *People* v. *Jackson*, 22 N. Y. 2d 446 (N. Y. Ct. App. 1968); *People* v. *Boone*, 22 N. Y. 2d 76 (N. Y. Ct. App. 1968); *People* v. *Weis*, 30 A. D. 2d 877 (2d Dept. 1968); *People* v. *Burwell*, 30 A. D. 2d 842 (2d Dept. 1968); *People* v. *Bastone*, 30 A. D. 2d 828 (2d Dept. 1968); *People* v. *Cassidy*, 30 A. D. 2d 795 (1st Dept. 1968); *People* v. *McKendall*, 30 A. D. 2d 717 (3rd Dept. 1968); *People* v. *Pilon*, 30 A. D. 2d 365 (3rd Dept. 1968); *People* v. *Balatnicov, et al.*, N.Y.L.J. 1/28/69, p. S12, col. 4 (N. Y. Co. Sup. Ct. CULKIN, J.); *United States ex rel. LaBelle* v. *Mancusi*, —— F. 2d ——, Sl. Sh. Op. #209 Sept. Term 1968, p. 627 (U. S. Ct. App. 2d Cir., dec'd December 3, 1968).

versed on collateral attack. However, where an appeal had been dismissed in January, 1950; but on an appeal from coram nobis raising another issue, petitioner was permitted to reinstate his appeal from his 1948 conviction it has been held that the petitioner may not raise claims of illegal search and seizure on the reinstated appeal. *United States ex rel. Wallen* v. *Warden*, 258 F. Supp. 1012 (S. D. N. Y. 1966).

It has thus become increasingly apparent since this Court's decision in *Johnson* v. *New Jersey*, that a substantial number of cases will be affected by the applicability of *Miranda* on retrial, and so the states that have decided the issue more recently have tended to hold that *Miranda* does not apply, while those that decided the issue earlier held that it did. Listing the states in chronological order, the results are as follows ("Yes" indicates a decision to apply *Miranda* on retrial; "No" indicates a decision not to apply *Miranda* on retrial):

Date	*Decision*	*Jurisdiction*	*Citation*
July 1, 1966	Yes	Wisconsin	*State* v. *Shoffner*[1]
July 11, 1966	Yes	Arizona	*State* v. *Brock*
July 13, 1966	Yes	5th Cir. Ct. of Appeals	*Gibson* v. *United States*
July 14, 1966	Yes	Kansas	*State* v. *McCarther*
July 18, 1966	Yes	4th Cir. Ct. of Appeals	*Moorer* v. *South Carolina*
July 22, 1966	?[2]	Rhode Island	*State* v. *Bradshaw*
Dec. 13, 1966	Yes	Hawaii	*State* v. *Ruiz*
March 3, 1967	Yes	Kentucky	*Creech* v. *Commonwealth*
March 27, 1967	No	Delaware	*Jenkins* v. *Delaware*
May 3, 1967	?[2]	9th Cir. Ct. of Appeals	*Amsler* v. *United States*

[1] All of these cases have been cited in previous footnote on pp. 2-4. Therefore, "*supra*" is to be understood following citations.

[2] The Supreme Court of Rhode Island specifically refused to reach the question of whether *Miranda* applies on retrial but gives a rationale for so applying it. 221 A. 2d 817, note 1.

Date	*Decision*	*Jurisdiction*	*Citation*
May 22, 1967	Yes	3rd Cir. Ct. of Appeals	*Virgin Islands* v. *Lovell*
June 20, 1967	Yes[4]	North Carolina	*State* v. *Jackson*
June 22, 1967	No	Illinois	*People* v. *Worley*
July 7, 1967	No	New Jersey	*State* v. *Vigliano*
July 10, 1967	Yes	California	*People* v. *Doherty*
Dec. 12, 1967	Yes	Indiana	*Dell v. State*
Jan. 24, 1968	No	Maryland	*Boone* v. *State*
Jan. 26, 1968	Yes	9th Cir. Ct. of Appeals	*United States ex rel. Walker* v. *Young*
Jan. 31, 1968	No—O.K.[5]	3rd Cir. Ct. of Appeals	*Vigliano* v. *Thevos*
March 29, 1968	No	Tennessee	*Patten* v. *State; Murphy* v. *State*
May 22, 1968	No[6]	North Carolina	*State* v. *Branch; State* v. *Lewis*
May 23, 1968	Yes[7]	Alabama	*Smith* v. *State*
July 2, 1968	No	New York	*People* v. *Sayers*
August 29, 1968	Yes[8]	7th Cir. Ct. of Appeals	*United States* v. *Phillips*

[3] The 9th Circuit Court of Appeals suggested without deciding that *Miranda* be applied on retrial. 381 F. 2d 37, 49. Also see subsequent 9th Circuit decision *United States* v. *Young* listed on the chart *infra*.

[4] But see *State* v. *Branch* and *State* v. *Lewis* in which North Carolina changed its mind and holds that *Miranda* should not apply on retrial. Chart *infra*.

[5] While the 3rd Circuit did not change its rule applying *Miranda* on retrial (see *Virgin Islands* v. *Lovell, supra*), it held that New Jersey had the right to make a contrary rule.

[6] Compare this decision with the previous one to apply *Miranda* on retrial. *State* v. *Jackson, supra*.

[7] The Supreme Court of Alabama held that it was not free to decide whether *Miranda* applied on retrial, but was bound by the Court of Appeals for the 5th Circuit. *Gibson* v. *United States, supra*.

[8] The Court of Appeals held that *Miranda* should have applied in the trial of this case, but it did not decide whether that trial was the original or a retrial. 401 F. 2d 301, 307.

On examination of the decisions by the various courts on this issue certain patterns become clear. Most of the states which applied *Miranda* to retrials decided the case shortly after this Court's decision in *Johnson*. Subsequently, the decision in *Stovall* v. *Denno*, 388 U. S. 293 made the relevant date that of the lineup, rather than trial and thus insured that the decisions in *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v. *California*, 388 U. S. 263 would not be applied on retrials.

The purpose of *Stovall*, as the purpose in *Johnson*, was to change a previously valid investigative practice. By demonstrating that retrospectivity of a new constitutional interpretation can be limited so as not to affect certain future trials, the 1967 decision in *Stovall* v. *Denno* was an important precedent to the jurisdictions that thereafter were presented with the question of whether *Miranda* should be applied to retrials.

Petitioner contends that the judicial process would be "visibly imperfect" if it were to permit a court to apply different measures of admissibility of confessions (to wit: voluntariness and *Miranda*) at the same time (petr's br. p. 21). However, a separate standard of voluntariness is regularly applied by all courts considering collateral attacks on pre-*Miranda* convictions. Specifically when the determination of the admissibility of a confession in such a case has not met the requirements of *Jackson* v. *Denno*, 378 U. S. 368, it has been held that the standard to be followed in the *Jackson* hearing is that of voluntariness of the confession. *Carter* v. *Eyman*, 281 Fed. Supp. 776 (D. Ariz. 1968). Also see *State* v. *Milow*, 199 Kan. 576, 433 P. 2d 538 (Sup. Ct. Kan., 1967); *In Re Lopez*, 62 A. C. 380, 42 Cal. Rptr. 188, 398 P. 2d 380, 383 (Sup. Ct. Cal. 1965).

The only case which suggests a contrary rule is the District Court's decision in *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966), *aff'd per curiam*

on orig. op. 374 F. 2d 472 (3rd Cir 1967). Judge Wortendyke held that the fact that the trial judge made his finding of voluntariness in the presence of the jury violated the standards of *Jackson* v. *Denno, supra*. He ordered that a new trial be held because a jury might have been prejudiced by this determination. He further held that at such a hearing the confession would be inadmissible unless the interrogation had complied fully with the standards of *Miranda* enunciated seven years thereafter. He relied on *Gibson* v. *United States, supra*, for the proposition that the standards of *Miranda* apply on retrial. Since this Court reversed on the ground that neither a new trial nor a post-conviction hearing was required it did not reach the issue of the applicability of the *Miranda* rules. *Pinto* v. *Pierce*, 389 U. S. 31.

California, which has applied *Miranda* on retrial (*People* v. *Doherty, supra*) is nonetheless developing an entire jurisprudence distinguishing between the question of voluntariness and that of compliance with the *Miranda* rules for interrogation. For instance, on a habeas corpus application, the California Supreme Court found errors in a defendant's separate trial on the issue of penalty and ordered a retrial of that issue. *In Re Jackson*, 61 Cal. 2d 500, 39 Cal. Rptr. 220, 393 P. 2d 420 (Sup. Ct. Cal. 1964). That retrial was held before a judge and consisted of the introduction of the transcripts of the prior trials of guilt and of penalty. On his appeal from the decision reimposing the death penalty, Jackson claimed a violation of his rights under *Escobedo* and *People* v. *Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (Sup. Ct. Cal. In Banc 1965) by the introduction of the transcripts of his confession and testimony at his originl trial on the issue of guilt. The State Supreme Court (*People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P. 2d 600 [Cal. Sup. Ct. In Bank 1967]) held that although the standards of *Escobedo* and *Dorado* apply on retrial (*People* v. *Doherty, supra*), this retrial was limited to the issue of penalty. Therefore, the admissibility of

Jackson's admissions at his trial on the issue of guilt are to be judged on their voluntariness; but when the transcripts of that trial are used on a retrial concerning the penalty, those admissions and the testimony which was the fruit of those admissions are to be judged by the standards enunciated in *Escobedo* and *Dorado*. It is to be presumed that on Jackson' second retrial of the issue of penalty, the admissibility of that evidence would also be measured by the standards of *Miranda*. In his partial dissent, Justice Peters criticizes the unrealistic distinction between the retrial on the issue of guilt and the retrial on the issue of penalty. *Id.* at 603.

California also has held that a failure to object to a confession as violative of the standards of *Miranda* constitutes a waiver, where such a failure would not constitute a waiver of the issue of voluntariness. The rationale for that distinction is that the former violation is less offensive than the latter, a proposition for which *Johnson* v. *New Jersey, supra* is cited. *People* v. *Castro*, 65 Cal. Rptr. 62, 64 (Ct. App., 2d Dist., Div. 3, 1968); *People* v. *Marquez*, 66 Cal. Rtpr. 615, 621 (Ct. App. 2d Dist. 1968).

It thus is apparent that distinction between coercive interrogation and that which does not meet the positive requirements of *Miranda* are developing whether or not *Miranda* is applied to retrials. In fact, this distinction might well be more "visible" in jurisdictions which have applied *Miranda* retrospectively to retrials. In such jurisdictions there might also be a tendency to assess pre-*Miranda* interrogations less strictly than would be the case if the interrogators were on notice of *Miranda's* requirements thereby setting precedent for an unnecessarily stringent interpretation of *Miranda*.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of the State of Deleware that the standards of Miranda v. Arizona did not govern the retrial in this case should be affirmed.

Dated: New York, New York
February, 1969

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 748.—October Term, 1968.

Thornton A. Jenkins, Petitioner, v. State of Delaware.	On Writ of Certiorari to the Supreme Court of Delaware.

[June 2, 1969.]

Mr. Chief Justice Warren delivered the opinion of the Court.

In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), we held that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), "applies only to cases in which the trial began after the date of our [*Miranda*] decision . . . ." 384 U. S., at 721. In this case, we must decide whether *Miranda*'s standards for determining the admissibility of in-custody statements apply to post-*Miranda* retrials[1] of cases originally tried prior to that decision.[2] We hold that they do not.

Petitioner was arrested on the morning of March 17, 1965, as a murder suspect, and was interrogated on three separate occasions, at 11:30 a. m., 2:50 p. m., and 7:05 p. m. Although indigent, he was not advised that he had the right to have an attorney present at the State's expense. Approximately 10 minutes after the evening interrogation began, petitioner gave the police a statement in which he admitted struggling with the victim during a burglary the preceding evening.

[1] The word "retrial" is used in this opinion to refer only to a subsequent trial of a defendant whose original trial for the same conduct commenced prior to June 13, 1966, the day on which *Miranda* was announced.

[2] Petitioner's remaining contentions have been adequately resolved by the court below. See *Jenkins* v. *State*, 230 A. 2d 262 (1967), and *Jenkins* v. *State*, 240 A. 2d 146 (1968).

Petitioner's first trial commenced on January 13, 1966. He did not take the stand, but his incriminating statement was admitted into evidence. The jury found him guilty of murder in the first degree and burglary in the fourth degree. Disregarding the jury's recommendation, the trial court sentenced him to death. During the pendency of petitioner's appeal to the Supreme Court of Delaware, we decided *Miranda* and *Johnson*. In reversing petitioner's conviction on various state grounds, the Delaware Supreme Court also determined, *sua sponte*, that under *Johnson* petitioner's statement, which was obtained without fully advising him of his constitutional rights, would be admissible at his retrial. 230 A. 2d 262 (1967). It reasoned that the retrial would be a mere continuation of the case originally commenced prior to our decision in *Miranda*.

Petitioner's second trial began on October 2, 1967. He was convicted of second degree murder and sentenced to life imprisonment. The Supreme Court of Delaware affirmed, again rejecting petitioner's argument that under *Johnson* his incriminating statement was inadmissible at his retrial. 240 A. 2d 146 (1968). Because of a disagreement among state courts over this issue,[3] we granted

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[3] At least eight States, including Delaware, decline to apply *Miranda* to post-*Miranda* retrials of cases originally tried prior to that decision. See *People* v. *Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (1967) (dictum); *Boone* v. *State*, 3 Md. App. 11, 237 A. 2d 787 (Md. Ct. Spec. App. 1968) (dictum), cert. denied, 393 U. S. 872 (1968); *Chapman* v. *State*, 162 N. W. 2d 698 (Minn. 1968); *State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967) (dictum); *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968); *State* v. *Lewis*, 274 N. C. 438, 164 S. E. 2d 177 (1968) (dictum); *Murphy* v. *Tennessee*, 426 S. W. 2d 509 (Tenn. 1968).

At least nine other States have indicated in dicta that *Miranda* should be applied to such retrials. See *Smith* v. *State*, 282 Ala. 268, 210 So. 2d 826 (1968); *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966); *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967);

certiorari. 393 U. S. 950 (1968). For the reasons stated below, we affirm.

Petitioner and the decisions he relies upon [4] emphasize our references in *Johnson* to "trials" commenced before the date *Miranda* was decided and our stated concern for the reliance placed on pre-*Miranda* standards by trial courts as well as by law enforcement officers. Petitioner argues that this "studied" focus on the trial process indicates that we intended *Miranda* to be applied to retrials, which, he insists, begin that process anew. As Delaware correctly points out, however, more than once we stated our holding in *Johnson* in terms of "cases" commenced before the date of *Miranda*. See 384 U. S., at 733. Delaware and the authorities it relies upon [5] argue that, since the word "case" usually incorporates all the judicial proceedings against an accused, a retrial is not the "commencement" of a case. Delaware also quotes our statement that only "[f]uture defendants will

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State v. *Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966); *Dell* v. *State*, 231 N. E. 2d 522 (Ind. 1967); *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966); *Creech* v. *Commonwealth*, 412 S. W. 2d 245 (Ct. App. Ky. 1967); *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458. In *State* v. *Bradshaw*, 221 A. 2d 815, 817, n. 1 (R. I. 1966), the court expressly declined to pass on the issue in an opinion reversing a conviction on other grounds, but it nevertheless suggested that under *Johnson* the defendant's statement might not be admissible at his retrial.

The United States Court of Appeals for the Seventh Circuit has held *Miranda* applicable, *United States* v. *Phillips*, 401 F. 2d 301 (C. A. 7th Cir. 1968); and that holding is supported by dicta in at least three other circuits. See *United States* v. *Young*, 388 F. 2d 675 (C. A. 9th Cir. 1968); *Virgin Islands* v. *Lovell*, 378 F. 2d 799, 802, n. 4 (C. A. 3d Cir. 1967); *Gibson* v. *United States*, 363 F. 2d 146 (C. A. 5th Cir. 1966). Without discussion, the Fourth Circuit appears to have reached a contrary result by implication. *Moorer* v. *South Carolina*, 368 F. 2d 458 (C. A. 4th Cir. 1966).

[4] *E. g., United States* v. *Phillips, supra; People* v. *Doherty, supra.*

[5] *E. g., People* v. *Worley, supra; State* v. *Vigliano, supra.*

benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test." *Id.*, at 732. Delaware suggests that petitioner, who was tried six months before *Miranda*, cannot be regarded as a "future" defendant within the meaning of *Johnson*. That there is language in *Johnson* supporting the positions of both petitioner and respondent demonstrates what some courts and commentators have readily recognized: in that decision, we did not consider the applicability of *Miranda* to retrials.[6] The issue simply was not presented.

Petitioner buttresses his interpretation of *Johnson* by arguing that *Miranda* must be applied to retrials in order to insure the uniform treatment of individuals similarly situated. If it is not applied, he points out, it is possible that different standards for the protection of constitutional rights could be applied to two defendants simultaneously tried in the same courthouse for similar offenses. This anomaly could result if one of the defendants had been previously tried for the same offense prior to *Miranda*. This identical result, however, is also possible under our more recent prospectivity decisions. Because both *Desist* v. *United States*, 394 U. S. 244 (1969), and *Stovall* v. *Denno*, 388 U. S. 293 (1967), selected the date on which the prohibited practice was engaged in, rather than the date the trial commenced, to determine the applicability of newly formulated constitutional standards, those standards do not apply to retrials of defendants originally tried prior to the dates the standards were announced. In fact, under those decisions, different rules could govern where neither de-

[6] *E. g.*, *Smith* v. *State*, *supra*; *People* v. *Worley*, *supra*; *People* v. *Sayers*, *supra*; Comment, The Applicability of Miranda to Retrials, 116 U. Pa. L. Rev. 316, 320 (1967); Case Comment, Post-Miranda Retrials of Pre-Miranda Defendants, 25 Wash. & Lee L. Rev. 108, 109 (1968).

fendant had been tried before, depending upon when the condemned practice was engaged in.

Moreover, as petitioner acknowledges, *Johnson* made it quite clear that *Miranda* need not be applied to trials commenced prior to that decision but not yet final when it was announced. On that date, petitioner's case was in precisely that posture. The type of apparent incongruity petitioner urges us to avoid is equally present in refusing to apply *Miranda* to defendants whose cases, like petitioner's, were not final on the date *Miranda* was decided, yet making an exception for petitioner simply because he was afforded a post-*Miranda* retrial for reasons wholly unrelated to the admissibility of his incriminating statements. Nor is petitioner's hypothetical more disconcerting than applying the new standards for in-custody interrogation to Ernesto Miranda while denying them to other defendants whose cases, for wholly fortuitous reasons, simply reached this Court at a later date, although the defendants in those cases may have been both interrogated and tried after Ernesto Miranda.

In short, petitioner's concern for what he refers to as "visible imperfection[s] in the judicial process" merely highlights the problem inherent in prospective decision-making, *i. e.*, some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the specter of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of a newly formulated constitutional principle.

Once the need is established for applying the principle prospectively, as the Supreme Court of New Jersey has

pointed out, "there is a large measure of judicial discretion involved in deciding . . . the time from which the new principle is to be deemed controlling." *State* v. *Vigliano*, 50 N. J. 51, 65–66, 232 A. 2d 129, 137 (1967). In our more recent decisions in this area, we have regarded as determinative the moment at which the discarded standards were first relied upon. See, *e. g.*, *Desist* v. *United States*, *supra*; *Stovall* v. *Denno*, *supra*. The point of reliance is critical, not because of any constitutional compulsion, but because it determines the impact that newly articulated constitutional principles will have upon convictions obtained pursuant to investigatory and prosecutorial practices not previously proscribed. See *Johnson* v. *New Jersey*, *supra*, at 733. See generally, W. Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967).[7]

In *Johnson*, after considering the need to avoid unreasonably disrupting the administration of our criminal

[7] Our initial approach to prospective decision-making has undergone some modification. Compare *Linkletter* v. *Walker*, 381 U. S. 618 (1965), with *United States* v. *Desist*, 394 U. S. 244 (1969). With *Johnson* we began placing increasing emphasis upon the point at which law enforcement officials relied upon practices not yet proscribed; and, more recently, we have selected the point of initial reliance. See, *e. g.*, *United States* v. *Desist*, *supra*; *Stovall* v. *Denno*, 388 U. S. 293 (1967). In addition to being more consistent with the fundamental justification for not applying newly enunciated constitutional principles retroactively, this latest approach has obviated at least one administrative problem, the treatment of retrials. Our experience, therefore, has confirmed Mr. Justice Schaefer's observation: "Sound growth can be promoted and erratic results avoided by focusing attention on the element of reliance that justifies the technique. Even when that is done there will not always be agreement as to the quality or degree of reliance that justifies a particular prospective limitation. But the area of disaffection will be narrowed if time before and time after are measured from the moment of reliance." W. Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631, 646 (1967).

laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitutional standards then applicable. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). As we pointed out, however, that choice "would [have] impos[ed] an unjustifiable burden on the administration of justice." 384 U. S., at 733. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See W. Schaefer, *supra*, at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*.

This same concern for the justifiable reliance of law enforcement officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials, which place a much heavier burden upon prosecutors to compensate for the inadmissibility of incriminating statements obtained and admitted into evidence pursuant to practices not previously proscribed. See, *e. g.*, *State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967); *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968); Comment, The Applicability of Miranda to Retrials, 116 U. Pa. L. Rev. 316, 324–325 (1967). As we stated in *Stovall*, "[I]nquiry would be handicapped by the unavailability of witnesses and dim memories." 388 U. S., at 300. The burden

would be particularly onerous where an investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case.[8] Moreover, we cannot assume that applying *Miranda* to retrials would affect only a small number of cases. It could, for example, render significantly more difficult the prosecutions of defendants, some of whom may have been convicted many years ago, who are afforded retrials because their convictions were obtained in violation of recently articulated constitutional principles that are fully retroactive. See, *e. g., Berger* v. *California,* 393 U. S. 314 (1969); *Roberts* v. *Russell,* 392 U. S. 293 (1968). Such a decision could also pose a serious obstacle to the successful prosecution of an undetermined number of defendants whose pre-*Miranda* convictions are reversed because of errors under federal or state law that do not even constitute constitutional violations.[9]

In determining how much weight to give the increased evidentiary burden that would result if we were to insist that *Miranda* be applied to retrials, we must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants. As we pointed out in *Johnson,* an individual who cannot claim the benefits of

[8] In one recent case, for example, in which the court refused to apply *Miranda* to the defendant's retrial, it noted: "The investigation of this brutal assault and the interrogation of defendant began in January 1955—more than 12 years previous to this retrial. The evidence is clear that in 1955 defendant was warned of his constitutional rights in accordance with the requirements then prevailing." *North Carolina* v. *Lewis,* 1 N. C. App. 296, 297–298, 161 S. E. 2d 497, 499 (1968).

[9] See, *e. g., United States* v. *Phillips, supra* (discretion abused by admitting unduly "prejudicial" evidence); *State* v. *Ruiz, supra* ("plain error" in trial court's fact-finding); *Boone* v. *State, supra* (insufficient corroboration of accomplice's testimony).

Miranda may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily. Moreover, he may invoke a "substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous . . . , [taking] specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance." 384 U. S., at 730. As a result, not applying *Miranda* to retrials will not preclude the invocation of "the same safeguards as part of an involuntariness claim." *Ibid.* Thus, because of the increased evidentiary burden that would be placed unreasonably upon law enforcement officials by insisting that *Miranda* be applied to retrials, and for all the reasons we gave in *Johnson* for not applying *Miranda* retroactively, we hold that *Miranda* does not apply to any retrial[10] of a defendant whose first trial commenced prior to June 13, 1966.

Accordingly, the judgment of the Supreme Court of Delaware is *Affirmed.*

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents for the reasons stated in his dissenting opinions in *Linkletter* v. *Walker*, 381 U. S. 618, 640, and *Johnson* v. *New Jersey*, 384 U. S. 719, 736.

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[10] For purposes of this holding, it is immaterial whether state law treats a retrial as the continuation of the original trial, see, *e. g.*, *People* v. *Worley*, *supra*, or as a completely new trial that proceeds as if the former trial never occurred. See, *e. g.*, *State* v. *Brock*, *supra*. What is determinative is that the defendant is being tried for the same conduct that was the subject of a previously reversed conviction. A State is free, of course, for any reason it finds persuasive, to apply *Miranda* to a subsequent trial of a defendant whose original trial commenced prior to that decision. See *Johnson* v. *New Jersey*, *supra*, at 733.

SUPREME COURT OF THE UNITED STATES

No. 748.—October Term, 1968.

Thornton A. Jenkins, Petitioner, *v.* State of Delaware.	On Writ of Certiorari to the Supreme Court of Delaware.

[June 2, 1969.]

Mr. Justice Harlan, dissenting.

As one who has never agreed with the *Miranda* case but nonetheless felt bound by it,* I now find myself in the uncomfortable position of having to dissent from a holding which actually serves to curtail the impact of that decision.

I feel compelled to dissent because I consider that the new "retroactivity" ruling which the Court makes today is indefensible. Were I free to do so, I would hold that this petitioner is entitled to the benefits of *Miranda*, this case being before us on direct review and being one which had not become final prior to the decision of *Miranda*. See my dissenting opinion in *Desist* v. *United States*, 394 U. S. —, — (1969); *Linkletter* v. *Walker*, 381 U. S. 618 (1965). But since as to the retroactivity issue I am also bound by *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), I must judge that issue within the confines of *Johnson*, which does not appear to have been overruled by what was done in *Desist* v. *United States*, *supra*.

In the *Johnson* case we held that the "guidelines" of *Miranda* should apply to all "persons whose trials had not begun as of June 13, 1966," 384 U. S., at 734, the date on which *Miranda* was handed down. Today,

*See my dissenting opinion in *Miranda* v. *Arizona*, 384 U. S. 436, 504 (1966), and my concurring opinion in *Orozco* v. *Texas*, 393 U. S. —, — (1969).

however, the Court holds that *Miranda* does not apply to persons whose *retrials* have commenced after that date, if the original trial had begun before *Miranda* was decided. I find it quite impossible to discern in the rationale of *Johnson* any solid basis for the distinction now drawn.

The Court states that the retroactivity rule adopted in *Johnson* was "an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted." *Ante*, at 7. I too believe that a desire not to interfere with trials which were concluded or already underway at the time of *Miranda* lay at the core of what was done in *Johnson*. See 384 U. S., at 732–735. But that rationale would seem to require application of *Miranda* to subsequent retrials, rather than the contrary result mandated by the Court. When a defendant has had his pre-*Miranda* conviction set aside on other than *Miranda* grounds and is being retried, there is by hypothesis no "conviction validly obtained" which might be "needlessly aborted" by application of the *Miranda* standards. There is no ongoing trial in which the prosecution's strategy might have been premised on pre-*Miranda* confession rules.

I am also left wholly unpersuaded by the Court's statement that application of *Miranda* to retrials would impose an intolerable "evidentiary burden" on prosecutors, for the Court ignores the fact that *Miranda* will impose a very similar burden whenever a defendant's *first* trial has for one reason or another been substantially delayed and its commencement carried beyond the *Johnson* cut-off date.

Apart from the two propositions just discussed, the Court offers nothing in justification of its trial-retrial distinction beyond the general observation that the retroactivity "technique" necessarily entails "incongruities"

which must be tolerated because of "the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Ante,* at 5. But surely it is incumbent upon this Court to endeavor to keep such incongruities to a minimum. This in my opinion can only be done by turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle. See my dissenting opinion in *Desist, supra.* What is done today leads me again, see *ibid.*, to urge that the time has come for us to take a fresh look at the whole problem of retroactivity.

I would reverse the judgment of the Supreme Court of Delaware. It would be less than frank were I not to say that I cast this vote with reluctance, feeling as I do about the unsoundness of *Miranda.*